88-624

NO. 88-

Supreme Court, U.S.
FILED
OCT 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROY HICKS,

Petitioner,

V.

ROBERT C. FEENEY, individually and in his official capacity as Director of the Delaware State Hospital, a facility in the Division of Mental Health, Department of Health and Social Services, State of Delaware,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOSEPH M. BERNSTEIN
1102 West Street
Suite 702
Wilmington, DE 19801
302-656-9850
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court exercise its supervisory powers to correct the failure by the Court of Appeals to follow the "law of the case," established in a prior appeal in the same case, where the question of what issues had been decided in the prior appeal was determinative of the outcome of the subsequent appeal?

2. Is the dismissal of Petitioner's case as a discovery sanction a denial of due process under Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982), notwithstanding the severity of the Petitioner's misconduct in discovery, where a prior decision of the Court of Appeals had established as the law of the case that a denial of procedural due process had been proven, and where the only claims remaining in the case on remand were (1) the nature and extent of Petitioner's actual damages;

and (2) the determination whether Respondent was entitled to qualified immunity, which was purely a legal issue for the court to decide.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	2
GROUNDS FOR JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. THE COURT OF APPEALS' FAILURE TO FOLLOW THE "LAW OF THE CASE" AS ESTABLISHED IN HICKS II FOR PURPOSES OF DETERMINING SANCTIONS UNDER RULE 37 DESERVES CORRECTION UNDER THE COURT'S SUPERVISORY POWERS	17
II. THE COURT'S POWER TO IMPOSE SANCTIONS UNDER RULE 37 CANNOT BE EMPLOYED TO DECIDE CLAIMS THAT WERE NOT AT ISSUE IN THE ORDER TO PROVIDE DISCOVERY	28
CONCLUSION	40
APPENDIX	
OPINION OF THE COURT OF APPEALS	A-1
OPINION OF THE DISTRICT COURT	A-20
OPINION OF THE COURT OF APPEALS IN HICKS II	A-47

OPINION OF THE DISTRICT COURT IN HICKS I — A-58

JUDGMENT OF THE COURT OF APPEALS ON REHEARING — A-98

ORDER OF THE COURT OF APPEALS DENYING REHEARING — A-100

ORDER OF THE COURT OF APPEALS GRANTING PANEL REHEARING — A-102

TEXT OF RULE 37(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE — A-104

TABLE OF AUTHORITIES

	Page
Arizona v. California, 460 U.S. 605 (1983)	18,19
Carey v. Piphus, 435 U.S. 247 (1978)	35,39
City of Riverside v. Rivera, __U.S.__, 106 S.Ct. 2686 (1986)	39
Cleveland Board of Education v. Loudermill, __U.S. __, 105 S.Ct. 1487 (1985)	23
Coca-Cola Bottling Co. v. Coca-Cola Co., 110 F.R.D.363 (D.Del. 1986)	36
Cowgill v. Raymark Industries, Inc., 832 F.2d 798 (3d Cir. 1987)	24,25
Daniels v. Williams, __U.S. __, 106 S.Ct. 662 (1986)	27

	Page
Dickinson v. Auto Center Manufacturing Co., 733 F.2d 1092 (5th Cir. 1983)	20
Evans v. Jeff D., __U.S.__, 106 S.Ct. 1531 (1986)	39
Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983)	20
Halaco Engineering Co. v. Costle, 843 F.2d 376 (9th Cir. 1988)	31
Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909)	30,31
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	5,33
Hensley v. Eckerhart, 461 U.S. 424 (1983)	40
Hewitt v. Helms, __U.S.__, 107 S.Ct. 2762 (1987)	15
Hicks v. Feeney, 596 F.Supp. 1504 (D.Del. 1984)	4,5,21 23,26,27
Hicks v. Feeney, 770 F.2d 375 (3d Cir. 1985)	5,6,7 22,24
Hicks v. Feeney, 850 F.2d 152 (3d Cir. 1988)	8,9,10, 12,13,15 16,23,25 26,27,28 29,32,33 37,40
In Re Sanford Fork & Tool Co., 160 U.S. 247 (1895)	19

	Page
Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee 456 U.S. 694 (1982)	12,30,31 32,38
Litman v. Massachusetts Mutual Life Insurance Co., 825 F.2d 1506 (11th Cir. 1987)	18,19
Memphis Community School District v. Stachura, __U.S.__, 106 S.Ct. 2537 (1986)	35
Messinger v. Anderson, 225 U.S. 436 (1912)	19
Mitchell v. Forsyth, __U.S.__, 105 S.Ct. 2806 (1985)	7,33,34
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	29
Parratt v. Taylor, 451 U.S. 527 (1981)	5
People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139 (3d Cir. 1984)	7
Quern v. Jordan, 440 U.S. 322 (1979	19
Schultz v. Onan Corp., 737 F.2d 339 (3d Cir. 1984)	20
Sibbald v. United States, 37 U.S. (12 Pet.) 488 (1838)	17
Stana v. School District of the City of Pittsburgh, 775 F.2d 122 (3d Cir. 1985)	23

	Page
Washington Steel Corp. v. TW Corp., 602 F.2d 594 (3d Cir. 1978)	21
White v. Murtha, 377 F.2d 428 (5th Cir. 1967)	19,28
White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982)	38

NO. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROY HICKS,

Petitioner,

V.

ROBERT C. FEENEY, individually and in his official capacity as Director of the Delaware State Hospital, a facility in the Division of Mental Health, Department of Health and Social Services, State of Delaware,

Respondent.

* * * *

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

* * * *

Petitioner, Roy Hicks, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on June 22, 1988, with rehearing denied on July 19, 1988.

OPINION BELOW

The opinion of the Court of Appeals is reported in 850 F.2d 152 and appears in the Appendix hereto at A-1. The opinion of the District Court which was appealed by the Petitioner to the Court of Appeals is not reported and appears in the Appendix hereto at A-20. Prior opinions of the Court of Appeals and the District Court in this case are reported in 770 F.2d 375 (Appendix hereto at A-47), and 596 F.Supp. 1504 (Appendix hereto at A-58), respectively.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 22, 1988. The Order of the Court denying panel rehearing and rehearing en banc was entered on July 19, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), this being a Petition for Writ of Certiorari after rendition of a final judgment in the United

States Court of Appeals for the Third Circuit.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved in this case is Rule 37(b) and 37(d) of the Federal Rules of Civil Procedure. The pertinent text thereof appears in the Appendix hereto at A-104.

STATEMENT OF THE CASE

This case is a civil rights action under 42 U.S.C. §1983 over which the District Court had jurisdiction under 28 U.S.C. §1343(3). The plaintiff, Roy Hicks ("Hicks"), was formerly a patient at the Delaware State Hospital ("DSH"), a mental hospital owned and operated by the State of Delaware. The defendant, Robert C. Feeney ("Feeney") was the Hospital Director of DSH and was named as a defendant in both his official and individual capacities. The relief sought by the plaintiff was declar-

atory and injunctive relief against the defendant in his official capacity and compensatory damages from him as an individual.

The action was commenced in April, 1983. The gist of the plaintiff's claim under 42 U.S.C. §1983 was that Feeney deprived him of liberty without due process of law, under the 14th Amendment, by causing him to be involuntarily confined at DSH for some fifty-four days without providing any hearing as to his mental status.

On November 8, 1984, the District Court granted summary judgment in favor of Feeney. See, Hicks v. Feeney, 596 F.Supp. 1504 (D.Del. 1984) ("Hicks I"). (A-58). The District Court agreed that the confinement procedures used by Feeney in the case deprived Hicks of his right to procedural due process under color of state law. However, the District Court held that

there was no violation of due process under the 14th Amendment because the failure to afford Hicks with the required hearing resulted from the "unauthorized failure of agents of the State to follow established state procedure," and because adequate post-deprivation remedies were provided by state law, citing Parratt v. Taylor, 451 U.S. 527, 543 (1981). Hicks I, 596 F.Supp. at 1511-1513. (A 81-85).

Alternatively, the District Court held that even if Hicks' due process claims had been successful, Feeney was entitled to "qualified immunity" under Harlow v. Fitzgerald, 457 U.S. 800 (1982). Hicks I, 596 F.Supp. at 1513-1515. (A 91-95).

On August 26, 1985, the District Court's judgment in Hicks I was vacated by the Third Circuit Court of Appeals. See, Hicks v. Feeney, 770 F.2d 375 (3d Cir. 1985) ("Hicks II"). (A-47). The Court of Appeals noted that "[T]he District Court

concluded that the confinement procedures used in this case deprived Hicks of his fourteenth amendment procedural due process rights under color of state law." Hicks II, 770 F.2d at 377. (A-49). The Court of Appeals then went on to reject the District Court's conclusion that Hicks' continued confinement at DSH was the result of a "random and unauthorized act," and held instead that "DSH's court commitment procedure... constituted an established state procedure that required a pre-deprivation hearing." Id. at 378-379. (A-53). Furthermore, the Court held that "DSH's court commitment policy equally requires a pre-deprivation hearing under Parratt and Hudson." Id. at 379 n.1. (A-53). The Court of Appeals therefore held that the District Court "erred in finding Parratt's postdeprivation remedy exception applicable to this case." Id, 770 F.2d at 378. (A-53).

The Court of Appeals next considered Feeney's claim to qualified immunity and held that the District Court had misapplied the "factual correspondence" standard of People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 143-144 (3d Cir. 1984). The Court of Appeals vacated the District Court's order granting qualified immunity to Feeney. Hicks II, 770 F.2d at 379-380. (A-55).

The Court of Appeals remanded the case to the District Court for "reconsideration of Feeney's immunity claim in light of Mitchell v. Forsyth, __U.S.__, 105 S.Ct. 2806 (1985)." Hicks II, 770 F.2d at 380. (A-57). The Court of Appeals further directed that "[O]n remand, the immunity analysis should focus on whether it was clearly established that Hicks could be involuntarily confined at DSH after the initial 72-hour period ordered by the family court judge." Id. (A 55-56).

Following the remand of the case to the District Court, Hicks moved for summary judgment. The district court entered an order setting a briefing schedule and allowing Feeney to take further discovery. Hicks was deposed on January 28, 1986. During the course of the deposition, Hicks stated that he did not want to continue with the deposition. Hicks then left the deposition and did not return. Hicks' deposition was then re-noticed by defendant's counsel for February 14, 1986. Hicks did not appear for the taking of the deposition. Hicks v. Feeney, 850 F.2d 152, 154 (3d Cir. 1988) ("Hicks IV") (A-4).

Feeney then filed a Motion to Compel Deposition of Plaintiff. While that motion was pending, Feeney's counsel filed another Re-Notice of Hicks' deposition, for April 8, 1986. Hicks did not appear for the taking of this deposition. Id. (A-4).

On July 9, 1986, counsel for Hicks sent a letter to the District Judge to explain his client's position concerning the taking of his deposition. Counsel advised the Court that his client told him that he did not appear for his depositions "because he did not want to discuss what he believed to be extremely private matters concerning what happened to him while he was confined at Delaware State Hospital." Counsel also advised the Court that he had informed his client concerning the possible imposition of sanctions for his refusal to appear for his deposition, and related that Hicks had told him that "he valued his privacy more than any compensatory damages that the court might award," and that he did not intend to appear at any future depositions. Id. (A 4-5).

On July 16, 1986, the District Judge entered an Order directing Hicks to appear

for his deposition on July 29, 1986. The Order further stated the following:

"2. If Mr. Hicks does not appear, the Court will impose one or more of the sanctions authorized by Rule 37 of the Federal Rules of Civil Procedure. These sanctions include assessment of fines and costs, a citation for contempt of court, an order precluding Mr. Hicks from prosecuting some or all of his claims and an outright dismissal of this case. While the Court respects Mr. Hicks' desire to protect his privacy, justice requires us to protect the interests of the defendant as well. There is no doubt that the defendant is entitled to question Mr. Hicks about the events at Delaware State Hospital. If Mr. Hicks does not appear and cooperate on July 29, 1986, the Court will use its Rule 37 powers."

Hicks did not appear for the taking of his deposition on July 29, 1986, as ordered by the Court. On August 29, 1986, counsel for Feeney filed a Motion for Sanctions, which recited Hicks' failure to appear for his deposition as ordered by the Court, and which sought dismissal of the action as a sanction under Rule 37(b).

In opposing the motion for sanctions, Hicks recognized that his refusal to be deposed had resulted in substantial

prejudice to Feeney, but asserted that an award of $1.00 nominal damages would be an effective alternative sanction. Hicks IV, 850 F.2d at 155. (A-5).

The District Court acknowledged that "the obvious remedy for such prejudice would be an Order precluding plaintiff from recovering punitive as well as compensatory damages." (A-42). However, the District Court then noted that if such a sanction was imposed, "all that would remain is plaintiff's claim for nominal damages together with a potential recovery of attorney's fees." (A-42). Stating that "the Court cannot condone a situation in which the recovery of attorney's fees has become the primary motivation for prosecuting a lawsuit," (A-43), the District Court dismissed the case.

Hicks then filed a timely appeal to the Court of Appeals. In the Court of Appeals, Hicks argued that the dismissal

exceeded the scope of the Court's Rule 37 powers. Hicks contended that the decision in Hicks II had already established as the "law of the case" that Feeney had deprived Hicks of his liberty without procedural due process, and had left only the issues of damages and qualified immunity to be determined on remand. Hicks IV, 850 F.2d at 155 (A-6).[1]

Citing this Court's admonition in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982), that any sanction under Rule 37 must be "'just' and must be specifically related to the particular 'claim' which was at issue in the order to provide discovery," Hicks argued that a dismissal under

---

[1] This same argument was considered and rejected by the District Court. The District Court, without specifically referring to the "law of the case" doctrine, concluded that the issue whether Hicks was deprived of liberty without due process "remains to be decided" because "the Third Circuit vacated [the judgment in Hicks I]; it did not reverse it." (A 36-37).

Rule 37 was improper because he was already entitled, at least, to an award of $1.00 nominal damages for the procedural due process violation established in Hicks II, assuming that Feeney was not entitled to qualified immunity. Id. 850 F.2d at 155 n.4 (A 6-7). Hicks also argued that it was improper for the court to use its Rule 37 powers to "decide" the issue of qualified immunity and to foreclose a possible entitlement to attorney's fees if the immunity defense failed because these matters were not "claims at issue" in the discovery order. See, Hicks IV, 850 F.2d at 160-161 (Rosenn, J., dissenting). (A 16-19).

On June 22, 1988, the Panel issued an Opinion and Order which affirmed, by a vote of 2-1, the District Court's dismissal of the action.[2] The panel majority rejected

---

[2] On March 11, 1988, the Court of Appeals had issued a unanimous Opinion and Order affirming the District Court's

Hicks' arguments concerning the effect of Hicks II on the exercise of the power to impose sanctions under Rule 37:

> "On rehearing, Hicks argues that he was entitled to judgment, at least for nominal damages, based on the doctrine of law of the case because our decision in Hicks II established 'liability' (citations omitted)...."

* * * *

---

dismissal of the case. On March 30, 1988, the Court of Appeals granted Hicks' Petition for Panel Rehearing and vacated the March 11th Opinion and Order. (A-102).

> "Certainly Hicks II announced some controlling legal principles but it is equally clear that Hicks could not have obtained any judgment until the qualified immunity issue was resolved...."
>
> * * * *
>
> "Since Hicks was not entitled to any judgment while qualified immunity remained open....the district court, in its sound discretion, retained the power to impose a full panoply of sanctions for Hicks' refusal to submit to discovery"

Hicks IV, 850 F.2d at 155 n.4 (emphasis added) (A 6-7 n.4.).

The panel majority also agreed with the District Court that a lesser sanction was not appropriate. "Without Hicks, this case becomes one for attorney's fees." Id. at 157. (A-10). Citing this Court's opinion in Hewitt v. Helms, __U.S.__, 107 S.Ct. 2762, 96 L.Ed.2d 654 (1987), the panel majority reasoned that Hicks would not be entitled to attorney's fees under 42 U.S.C. §1988 because he was not a "prevailing party." Id. (A-10).

Judge Rosenn filed a dissenting opinion in which he concluded that the dismissal by the District Court constituted an abuse of discretion. Judge Rosenn agreed that the decision in Hicks II had established, as the "law of the case" that Feeney had violated Hicks' rights to procedural due process. Hicks IV, 850 F.2d at 158 (Rosenn, J., dissenting). (A 12-14). Judge Rosenn also agreed that it was an abuse of discretion for the District Court to use Rule 37 sanctions to decide the issue of qualified immunity and thereby foreclose the possibility of an award of attorney's fees. Id. at 160-161 (A 17-19).

A second petition for rehearing was denied by the Court on July 19, 1988. (A-100).

ARGUMENT

I. THE COURT OF APPEALS' FAILURE TO FOLLOW THE "LAW OF THE CASE" AS ESTABLISHED IN HICKS II FOR PURPOSES OF DETERMINING SANCTIONS UNDER RULE 37 DESERVES CORRECTION UNDER THE COURT'S SUPERVISORY POWERS

The law of the case doctrine, self-imposed by the courts, was created to serve a fundamental role in the federal judicial system to insure that authority and responsibility remain properly allocated as between the three levels of courts within the federal judiciary. It is a specialized expression of the broader doctrine of stare decisis that is the very foundation of our federal judicial system. Its origin can be traced to the earliest decisions of this Court:

> "Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give

> any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded."

Sibbald v. United States, 37 U.S. (12 Pet.) 488, 491 (1838).[3]

The modern formulation of the law of the case doctrine is that "an appellate decision is binding in all subsequent proceedings in the same case unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice."[4] Litman v. Massachusetts Mutual Life Insurance Co., 825 F.2d 1506, 1510

---

[3] In Arizona v. California, 460 U.S. 605, 618 (1983), this Court observed that "the law of the case is an amorphous concept...[that] directs a court's discretion,...[but] does not limit the tribunal's power."

[4] None of these exceptions are applicable in this case.

(11th Cir. 1987). All of the circuits are in accord. Id. at 1511 (collecting cases).

Two facets of the law of the case doctrine are of particular relevance in this case: First, the decision of the appellate court is the law of the case in any subsequent appeals in the appellate court. Messinger v. Anderson, 225 U.S. 436, 437 (1912); White v. Murtha, 377 F.2d 428, 431-432 (5th Cir. 1967) (cited in Arizona v. California, 460 U.S. 605, 618 n.8 (1983)). Second, the lower court, and the court of appeals in a subsequent appeal, are bound not only by the explicit findings of the appellate court, but also by those matters decided by necessary implication.[5] In Re Sanford Fork & Tool Co., 160 U.S. 247, 256 (1895) ("The opinion delivered by this court at the time of

---

[5] At the same time, a district court is free to decide any issue that was not explicitly or implicitly decided on a prior appeal. See, Quern v. Jordan, 440 U.S. 322, 347 n.18 (1979).

rendering its decree may be consulted to ascertain what was intended by its mandate"); also see, e.g. Schultz v. Onan Corp., 737 F.2d 339, 345 (3d Cir. 1984) (accord); Gray Panthers v. Schweiker, 716 F.2d 23, 38 (D.C. Cir. 1983) (accord); Dickinson v. Auto Center Manufacturing Co., 733 F.2d 1092, 1098 (5th Cir. 1983) (accord).

The institutional values that are served by the law of the case doctrine are so fundamental that when the doctrine is ignored by the district court and also by the court of appeals, this Court's power of supervision should be exerted. This is such a case.

In Hicks I, the District Court specifically held that Hicks was deprived of liberty without procedural due process when Feeney continued his confinement at DSH for 54 days without affording Hicks any form of hearing as to his mental status:

> "Due process is denied when an individual is held on the basis of an ex parte order committing him for observation without the procedural safeguards commensurate with a long term commitment.
>
> * * * * *
>
> "In short, the requirements of procedural due process mandate reference to established commitment procedures if something more than a brief mental evaluation period is required...To do otherwise denies a constitutionally protected liberty interest of the probated defendant without due process of law."

Hicks I, 596 F.Supp. at 1509 (emphasis added). (A-73).[6]

This conclusion was not questioned or

---

[6] This holding was not challenged by Feeney as a basis for affirming the District Court's judgment. Feeney could have, but did not argue, as a ground for affirming the District Court judgment, that the District Court erred in finding a procedural due process violation, or erred in finding that Feeney was the person who would be held accountable. See, Washington Steel Corp. v. TW Corp., 602 F.2d 594, 600 (3d Cir. 1978) ("A prevailing party can support a District Court judgment on any ground, including ones overlooked or rejected by the District Court").

challenged by the Court of Appeals in Hicks II:

> "The District Court concluded that the confinement procedures used in this case deprived Hicks of his fourteenth amendment procedural due process rights under color of state law."

Hicks II, 770 F.2d at 377. (A-49). What the Court of Appeals did question, and ultimately reject, was the District Court's conclusion that the violation of procedural due process which occurred was the result of a "random and unauthorized act." Hicks II, 770 F.2d at 378-379 ("DSH's court commitment procedure thus constituted an established state procedure that required a pre-deprivation hearing"). (A-53). Furthermore, the Court held that "DSH's court commitment policy equally requires a pre-deprivation hearing under Parratt and Hudson." Id. at 379 n.1.

Thus, while the Court of Appeals, in Hicks II, stripped away the District Court's "Parratt doctrine," and rejected

its "qualified immunity" analysis, it nevertheless left intact the District Court's holdings that: (1) Hicks was deprived of a protected liberty interest by being confined at DSH, Hicks I, 596 F.Supp. at 1508; (2) that Hicks was denied procedural due process when his commitment continued beyond the time necessary for the Hospital to conduct a brief mental evaluation, Id. at 1509; and (3) that Feeney was the person who was responsible for any due process violation. Id. at 1508. These unreversed determinations of the District Court necessarily established the existence of a procedural due process violation. See, Hicks IV, 850 F.2d at 158 (Rosenn, J., dissenting).[7]

---

[7] If anything, decisions handed down subsequent to Hicks I have made it clear that procedural due process is denied when the governmental entity is in a position to provide pre-deprivation procedures, but fails to do so, notwithstanding the availability of post-deprivation remedies. See, Cleveland Board of Education v. Loudermill, __U.S. __, 105 S.Ct. 1487

On remand, these unreversed determinations became the law of the case. This conclusion is confirmed by the fact that the only instruction to the District Court on remand was "reconsideration of Feeney's immunity claim in light of Forsyth." Hicks II, 770 F.2d at 380. The court in Hicks II did not direct, or even suggest, that its finding that there had been a violation of procedural due process be reexamined.[8] See, Cowgill v. Raymark Industries, Inc., (1985); Stana v. School District of the City of Pittsburgh, 775 F.2d 122, 130 (3d Cir. 1985).

[8] The District Court rejected Hicks' argument that Hicks II had established a denial of procedural due process, which became the law of the case on remand, on the theory that "the Third Circuit vacated that Order, it did not reverse it." (A-37). In fact, the Third Circuit in Hicks II did not "vacate" the District Court's holding as to the existence of a violation of procedural due process: "We hold...that the district court erred in finding Parratt's post-deprivation remedy exception...applicable to this case. Id. 770 F.2d at 379. (A-53). The only thing that was "vacated" by the Third Circuit in Hicks II was the "order granting qualified immunity to Feeney." Id. at 380. (A-55).

832 F.2d 798, 802 (3d Cir. 1987) ("When a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations of the trial court normally continue to work an estoppel").[9]

When Hicks appealed the District Court's dismissal of the case under Rule 37, the Court of Appeals clearly recognized that the decision in Hicks II would be controlling, if not determinative, in deciding whether the District Court had abused its discretion in dismissing the case. See, Hicks IV, 850 F.2d at 155 n.4; Id. at 157 (Rosenn, J., dissenting). (A-11).

In addressing the question of what was decided in Hicks II, the Court of Appeals

---

9 In Cowgill, the terms "estoppel" and "law of the case" were used interchangeably. Id. 832 F.2d at 802.

somehow concluded that the decision in Hicks II did not establish Feeney's liability for the failure to provide a pre-deprivation hearing:

> "Reviewing Hicks II, we do not find such a holding...We made no findings as to whether a hearing took place and if not, why not."

Hicks IV, 850 F.2d at 155. (A-6).

The fact that no hearing of any kind as to Hicks' mental status ever took place, and why no hearing took place, was never in dispute.[10] In Hicks I, the District Court found that "the complaint seeking a hearing on Hicks' mental status was filed on December 27;[11] the Superior Court scheduled a probable cause hearing for January 14, 1983. That hearing never took place because the plaintiff was discharged from

---

10 In Hicks I, the district court specifically found that there were no material issues of fact in dispute. Id. 596 F.Supp. at 1508. (A 66-67).

11 This was 39 days after Hicks' initial commitment to DSH.

the Delaware State Hospital on January 12, 1983." Id. 596 F.Supp. at 1507. (A-62). (emphasis added). These findings by the District Court were adopted in toto by the Court of Appeals in Hicks II. Id. 770 F.2d at 377. (A-49).

The Court of Appeals also believed that Hicks II did not establish a denial of procedural due process and that dismissal under Rule 37 was therefore appropriate because "Hicks might have been able to shed some light on why he did not have a hearing..." Hicks IV, 850 F.2d at 155 (A-6). Such an inquiry, as a justification for dismissal under Rule 37, would be legally irrelevant. Since Feeney was in a position to provide a constitutionally required pre-deprivation hearing, and failed to do so, the reason for his failure is irrelevant. See, Daniels v. Williams, __U.S. __, 106 S.Ct. 662, 665 (1986) ("guarantee of due process [applies] to

deliberate decisions of government officials to deprive a person of life liberty or property") (emphasis in original).

In the dissenting opinion, Judge Rosenn characterized the panel majority's reading of Hicks II as "inexplicable" Id. 850 F.2d at 158. (A-14). Although the law of the case doctrine is not "an inexorable command," Murtha, 377 F.2d at 431, the panel majority's re-writing of Hicks II, in order to justify the Rule 37 dismissal, goes beyond the pale of any principled exercise of judicial discretion. This radical departure from the law of the case doctrine deserves correction by this Court.

II. THE COURT'S POWER TO IMPOSE SANCTIONS UNDER RULE 37 CANNOT BE EMPLOYED TO DECIDE CLAIMS THAT WERE NOT AT ISSUE IN THE ORDER TO PROVIDE DISCOVERY

The Court of Appeals' failure to adhere to the law of the case as established in Hicks II and the question of what

sanctions could be imposed under Rule 37 for Hicks' refusal to return to his deposition are interrelated. See, Hicks IV, 850 F.2d at 157 (Rosenn, J., dissenting). (A-11).

In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976), this Court endorsed a "dismissal as a weapon" approach to sanctions under Rule 37:

> "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

The above quoted language is nearly always invoked, as it was by the District Court and the Court of Appeals in this case, whenever a party's misconduct was deemed sufficiently egregious to warrant dismissal as a sanction under Rule 37.

Some six years later, in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982), this Court seemingly indicated that the district court's power to punish discovery-related misconduct, by ordering dismissal as a sanction under Rule 37, was not unlimited:

> "Rule 37(b)(2) contains two standards - one general and one specific - that limit a district court's discretion. First, any sanction must be 'just;' second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery."

These limitations are rooted in due process concerns. The Court explained that the requirement of some nexus between the sanction, the misconduct, and the matters in controversy merely reflected the rule of Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909). Id. In Hammond Packing, the Court held that striking the answer and entering default judgment against a corporate defendant that refused to produce

any documents or to permit its officers to be deposed did not deny the defendant due process because its refusal to produce material evidence created a presumption that its asserted defense was meritless. Id. 212 U.S. at 350-351.

In other words, the default judgment in Hammond Packing did not violate due process because the defendant's misconduct "related to matters in controversy in such a way as to interfere with the rightful decision of the case." Halaco Engineering Co. v. Costle, 843 F.2d 376, 381 (9th Cir. 1988). On the other hand, "due process is violated...if the behavior of the [disobedient party] will not support the Hammond Packing presumption," Insurance Corp., 456 U.S. at 706, - that his claim or defense is meritless.

The major question presented in this Petition for Certiorari is whether the mandate to both penalize and deter miscon-

duct in discovery, expressed in National Hockey League, overrides the limitations expressed in Insurance Corp. on the use of dismissal as a sanction for discovery abuse. These seemingly divergent principles collided in this case. When that happens, which one prevails?

It was never denied that Hicks' refusal to comply with the order to submit to the taking of his deposition was deliberate and wilful, if not in bad faith.[12] However, what if Hicks' misconduct, however egregious it may have been, does "not support the Hammond Packing presumption," Insurance Corp., 456 U.S. at 706, because it does not interfere with the rightful decision of the case. In such a case, does not the "penalty" then become "punishment," in violation of the due process clause?

---

[12] See, Hicks IV, 850 F.2d at 160 n.3. (Rosenn, J., dissenting). (A-17).

In this case, the dismissal violated due process under Insurance Corp. and Hammond Packing because Hicks' misconduct in refusing to be deposed would have had no bearing whatsoever upon the rightful determination of Feeney's entitlement to qualified immunity, which, as the Court of Appeals itself tacitly acknowledged, Hicks IV, 850 F.2d at 155 n.4 (A 6-7), was the only obstacle to Hicks' entitlement to judgment, at least for nominal damages.

Hicks' misconduct did not support the Hammond Packing presumption because the determination of Feeney's entitlement to "qualified immunity" was purely a legal issue. See, Harlow v. Fitzgerald, 457 U.S. 800, 815-816 (1982) (On a motion for summary judgment, "the judge appropriately may determine...whether the law was clearly established at the time an action occurred...[and]...[u]ntil this threshold immunity question is resolved, discovery

should not be allowed") Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (qualified immunity "is an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law").

The dismissal which occurred in this case does not support the Hammond Packing presumption because the determination of qualified immunity is purely a legal issue. In other words, Hicks' misbehavior could not have interfered with the rightful determination of Feeney's entitlement to qualified immunity.

Even assuming that Feeney was prejudiced in the extreme by his inability to depose Hicks, the best defense that Feeney would have been able to muster, with or without deposing Hicks, would have been to limit Hicks to $1.00 nominal damages.

Hicks would have been entitled to an award of $1.00 damages, for the procedural due process violation established in Hicks II, even if Hicks could prove no actual or presumed damages,[13] or even if Feeney could prove that Hicks' confinement would have continued had the constitutionally required procedural due process been provided in the first place.[14]

In this case, an order which conclusively established that Hicks was entitled to only nominal damages for the procedural due process violation established in Hicks II would have been fully effective to cure any prejudice resulting

---

13 See, Memphis Community School District v. Stachura, __U.S.__, 106 S.Ct. 2537, 2543 (1986) (Absent proof of "actual injury," the plaintiff will be awarded only nominal damages for §1983 violation).

14 See Carey v. Piphus, 435 U.S. 247, 260 (1978); (students who were suspended from school without being afforded procedural due process are entitled to recover only nominal damages if they "would have been suspended even if a proper hearing had been held").

from Feeney's inability to depose Hicks. Such an order, which the District Court itself described as "the obvious remedy," (A-42), would have given Feeney "the advantage of every possible inference that could fairly be drawn from the evidence sought." Coca-Cola Bottling Co. v. Coca-Cola Co., 110 F.R.D.363, 369 (D.Del. 1986).[15]

Hicks misbehavior did not support the use of the Hammond Packing presumption to dismiss the case, and thereby violated due process, because the dismissal unjustly rewarded Feeney by giving him more than he ever could have gained by deposing Hicks. The dismissal also unjustly punished Hicks by depriving him of more than he ever could have lost by submitting to the deposition.

---

[15] In Coca-Cola, the court declined to enter a default judgment even though the defendant had deliberately refused to obey the court's order to disclose the "secret ingredients" in Coca-Cola to the plaintiffs. Id. 110 F.R.D. at 369 n.14.

However, both the District Court and the Court of Appeals believed that a sanction which would have limited Hicks to $1.00 nominal damages, if Feeney was not entitled to qualified immunity, was not enough. The District Court concluded that Hicks' misconduct had turned the case into an "attorney's fees case," which "simply...should not be permitted to go forward." (A-43 n.7). The Court of Appeals agreed that restricting Hicks to nominal damages would not be enough because "[W]ithout Hicks, this case becomes one for attorney's fees." Hicks IV, 850 F.2d at 157. (A-10).

This language suggests that the real reason for the dismissal, rather than the imposition of any sanction short of dismissal, was to peremptorily foreclose the possibility that Hicks might be awarded attorney's fees had any lesser sanction been imposed. Just as Hicks' misbehavior

did not support the use of the Hammond Packing presumption to decide the issue of qualified immunity by dismissing the case, neither does it support its use to decide the issue of attorney's fees.

In the first place, Hicks' entitlement to an award of attorney's fees was not a "claim which was at issue in the order to provide discovery." Compagnie des Bauxites, 456 U.S. at 707. See, White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451-452 (1982) ("[T]he court's decision of entitlement to fees will require an inquiry separate from the decision on the merits...Their award is uniquely separable from the cause of action to be proved at trial").

Secondly, such reasoning, as a justification for dismissal under Rule 37, denigrates the primary purpose of civil actions brought under §1983 - to vindicate the violation of constitutionally protected

liberty interests. City of Riverside v. Rivera, __U.S.__, 106 S.Ct. 2686, 2694 (1986) (plurality opinion) ("[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort action benefiting only the individual plaintiffs whose rights were violated"). Such reasoning also denigrates the primary purpose of awards of attorney's fees in actions brought under §1983. See, Evans v. Jeff D., __U.S.__, 106 S.Ct. 1531, 1539 (1986) (In enacting 42 U.S.C. §1988, Congress intended the fee-shifting provision as "an integral part of the remedies necessary to obtain compliance with civil rights laws (citation omitted), to further the same general purpose - promotion of respect for civil rights - that led it to provide damages and injunctive relief"); Carey v. Piphus, supra, 435 U.S. at 257 n.11 (awards of nominal damages in procedural due process cases would not cause

state officials to deliberately ignore due process rights, in part because of potential liability for attorney's fees under §1988).[16]

CONCLUSION

Hicks has never denied the fact that Feeney's inability to depose him prejudiced Feeney in defending against Hicks' claim for compensatory damages. Also, it is not denied that Hicks failure was willful, and that Hicks was personally responsible for such failure. However, as the discussion herein demonstrates, the dismissal in this case did not come about because Hicks' misconduct interfered with the rightful decision of the case. See, Hicks IV, 850

---

[16] Hicks agrees that an award of nominal damages, had a lesser sanction been imposed, might well have affected the amount of attorney's fees to be awarded. See, Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) ("If... a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may well be excessive").

F.2d at 160 (Rosenn, J., dissenting), (A-18), ("I believe that Hicks' conduct has not obscured what remains as the preeminent issue in this case - the vindication of a constitutionally protected liberty interest").

The Writ of Certiorari should be granted because the District Court and the Court of Appeals ignored the "law of the case" established by Hicks II, and ignored the due process limitations on the imposition of sanctions established in Insurance Corp. of Ireland. The District Court and the Court of Appeals sanctioned the use of Rule 37 to give Feeney more that he ever could have obtained by deposing Hicks. Hicks' misconduct was used as an excuse to "decide" two claims - qualified immunity and attorney's fees - which were unrelated to any evidence which arguably could have been obtained through discovery.

Hicks' misconduct, although substantial, simply did not extend that far.

Respectfully Submitted,

JOSEPH M. BERNSTEIN
1102 West Street
Suite 702
Wilmington, DE 19801
302-656-9850
Attorney for Petitioner

Dated: October 11, 1988

NO. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROY HICKS,

Petitioner,

V.

ROBERT C. FEENEY, individually and in his official capacity as Director of the Delaware State Hospital, a facility in the Division of Mental Health, Department of Health and Social Services, State of Delaware,

Respondent.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3527

ROY HICKS,
Appellant

v.

ROBERT C. FEENEY,
individually and in his official capacity as Hospital Director of the Delaware State Hospital, a facility in the Division of Mental Health, Department of Health and Social Services State of Delaware,
Appellee

On Appeal from the United States
District Court For the
District of Delaware
(D. C. Civil Action No. 83-185)

Submitted under Third Circuit Rule 12(6)
January 5, 1988

Resubmitted before original panel May 26, 1988

BEFORE: SEITZ, HUTCHINSON and ROSENN,
Circuit Judges

(Opinion Filed June 22, 1988)

Joseph M. Bernstein, Esquire
Suite 702
1102 West Street
Wilmington, Delaware 19801
Attorney for Appellant

Marcia Rees, Deputy Attorney General
Department of Justice
State Office Building
820 N. French St.
Wilmington, Delaware 19801
Attorney for Appellee

OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

This case involves the dismissal of a plaintiff's action for failure to comply with a district court's discovery order. The sanction is harsh. Nevertheless, considering appellant's willful refusal to afford appellee discovery relevant, at the least, to the undecided issue of appropriate relief, the district court did not abuse its discretion. We will therefore affirm.

On November 18, 1982 the Family Court of the State of Delaware found plaintiff Roy Hicks (Hicks) guilty of criminal contempt. The court sentenced Hicks to thirty days in jail, but suspended the sentence in favor of a one year probation. As a condition of the probation, Hicks was sent to the Delaware State Hospital (DSH) for a seventy-two-hour evaluation, and for continued hospitalization, if recommended by DSH, "as may be permitted by law, unless sooner discharged according to law." Hicks was not released

until January 12, 1983, fifty-four days after his admission.[1]

Hicks brought a 42 U.S.C.A. § 1983 (West 1981) civil rights action in district court against Robert Feeney (Feeney), director of DSH. Hicks sought declaratory and injunctive relief against Feeney in his official capacity and compensatory damages against him as an individual. Both parties moved for summary judgment. The district court held that although Hicks's liberty interest was violated by his confinement at DSH, adequate post-deprivation remedies existed to remedy it. Therefore, his right to procedural due process was not violated. *Hicks v. Feeney*, 596 F. Supp. 1504, 1512 (D. Del. 1984) (*Hicks I*), *vacated*, 770 F.2d 375 (3d Cir. 1985). The district court also found that Hicks's substantive due process rights were not violated. *Id.* at 1513. Finally, the district court found that because Hicks's rights were not "clearly established" at the time of the violation, Feeney was entitled to qualified immunity. *Id.* at 1515.

On appeal, this Court held that the district court erred in applying the post-deprivation remedy exception to Section 1983 violations of *Parratt v. Taylor*, 451 U.S. 527 (1981). *Hicks II*, 770 F.2d at 379. We held DSH's commitment procedures were an established state procedure rather than the random and unauthorized act of a state officer. *Id.* at 378-79. Under *Parratt*, an established state procedure requires a pre-deprivation hearing. We also considered Feeney's claim of qualified immunity and found that the district court misapplied the factual correspondence standard of *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144 (3d Cir. 1984). *Hicks II*,

---

1. For a more detailed account of the underlying facts in this case, *see Hicks v. Feeney*, 770 F.2d 375, 376-77 (3d Cir. 1985) (*Hicks II*).

770 F.2d at 379-80. We therefore vacated the district court's order granting qualified immunity to Feeney and instructed the court to "focus on whether it was clearly established that Hicks could be involuntarily confined at DSH after the initial 72-hour period ordered by the family court judge." *Hicks II*, 770 F.2d at 380. If it were clearly established that this confinement violated Hicks's constitutional rights, then Feeney does not have qualified immunity. *Id.* We also instructed the district court to consider whether Delaware's Involuntary Commitment Act[2] creates a liberty interest that could form the basis of a Section 1983 action. *Hicks II*, 770 F.2d at 380 n.4.

On remand, Hicks moved for summary judgment. The district court entered an order setting a briefing schedule and allowing Feeney to take further discovery.

Hicks was deposed on January 28, 1986. After approximately forty minutes, he refused to answer any more questions.[3] After a one-hour recess, he did not return to the deposition. The deposition was rescheduled for February 14, 1986. Hicks failed to appear. Feeney filed a Motion to Compel Deposition of Plaintiff. While that motion was pending, Feeney rescheduled the deposition to April 8, 1986. Hicks did not appear. On July 9, 1986 Joseph Bernstein, Esq., counsel for Hicks, sent the district judge a letter explaining his client's position. He stated that he had been in contact with Hicks at least five times, both before and after the various deposition dates. Hicks told Bernstein that "he did not want to discuss what he believed to be extremely private matters concerning

---

2. Del. Code Ann. tit. 50, § § 5001-5014 (1983).

3. Hicks was being questioned about the notes he wrote during his confinement at DSH, which he did not have an opportunity to review prior to the deposition.

what happened to him while he was confined at the Delaware State Hospital." App. at A-54. Bernstein informed Hicks of the possibility of the imposition of sanctions for failing to appear at the deposition. Hicks replied that "he valued his privacy concerning these matters more than any compensatory damages that the court might award" and that he would not appear at any future depositions. *Id.*

The district court ordered Hicks to appear at a deposition on July 29, 1986 and to pay costs for the previous depositions. The court warned that additional sanctions, including an outright dismissal, would be imposed if Hicks failed to appear. Hicks did not appear. In his Memorandum in Opposition to Defendant's Motion for Sanctions, Hicks recognized that his refusal to be deposed resulted in substantial prejudice to Feeney and was willing to waive his "actual" injury claims. App. at A-80. However, Hicks continued to press for presumed and punitive damages. App. at A-80-81 & n.7. Hicks suggested that even a $1.00 award of nominal damages would be an alternative sanction to an outright dismissal. App. at A-80 n.6. Nevertheless, the district court dismissed the case. Hicks appeals from the district court's final order. We have jurisdiction under 28 U.S.C.A. § 1291 (West Supp. 1987).

Hicks first argues that the district court exceeded its power under Federal Rules of Civil Procedure 37(b)(2) in dismissing the case for failing to comply with discovery orders. The court clearly has the power to dismiss the case as a sanction against a party who fails to obey an order regarding discovery. Fed. R. Civ. P. 37 (b)(2)(C). The sanction must be specifically related to the particular claim at issue in the discovery order. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707-08 (1982). The

trial court has discretion over which sanctions to impose and "may make such orders in regard to the failure as are just." Fed. R. Civ. P. 37(b)(2).

Hicks argues, however, that the district court was limited in the sanctions it could apply because of our opinion in *Hicks II*. He claims *Hicks II* established Feeney's liability, leaving only the issue of monetary damages to be determined through discovery and trial. Reviewing *Hicks II*, we do not find such a holding. In *Hicks II* we held that the district court erred in applying the post-deprivation remedy exception to Section 1983 violations of *Parratt v. Taylor*, *supra*. This holding was based on a finding that DSH's court commitment procedure was not a "random and unauthorized act" but "an established state procedure that required a pre-deprivation hearing." *Hicks II*, 770 F.2d at 378-79. We made no findings as to whether a hearing took place and if not, why not. Certainly Hicks might have been able to shed light on why he did not have a hearing and why he was placed in a maximum security building. Feeney asked Hicks for this type of information during his deposition. App. at A-15-16, 32-34. Feeney contends that, without deposing Hicks, he cannot fully prepare a defense as to the issues of (1) whether his failure to follow constitutionally required procedure caused Hicks alleged damages; (2) whether Hicks would have remained at DSH even if the procedures had been followed; and (3) Hicks's actual damages. App. at A-72. We cannot summarily deny Feeney the opportunity to establish a defense.[4]

---

4. Hicks filed a petition for panel rehearing which was granted by order of March 30, 1988. On rehearing, Hicks argues that he was entitled to judgment, at least for nominal damages, based on the doctrine of law of the case because our decision in *Hicks II* established "liability." *See, e.g., Castle v. Cohen*, 840 F.2d 173, 180 n.10 (3d Cir. 1988) (after remand, district court to consider

Hicks's second argument on appeal is that the district court abused its discretion in dismissing the case contrary to our guidelines in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984). "In determining whether a District Court has abused its discretion in dismissing a complaint . . . we will be guided by the manner in which the court balanced the *Poulis* factors and whether the record supports its findings." *Ali v. Sims*, 788 F.2d 954, 957 (3d Cir. 1986).

In *Poulis* we set out the following factors for a District Court to balance in deciding whether to dismiss a case:

> (1) the extent of the *party*'s personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal,

---

court of appeals' opinion under law of case doctrine); *Cowgill v. Raymark Indus., Inc.*, 832 F.2d 798, 802 (3d Cir. 1987) (on remand, unreversed determinations of trial court become law of case). We have carefully considered that argument, but after reviewing the parties' rebriefing, must reject it. Certainly *Hicks II* announced some controlling legal principles but it is equally clear that Hicks could not have obtained any judgment until the qualified immunity issue was resolved. Even though the discovery does not on its face seem related to the qualified immunity issue, that issue was never reached and until it was decided no judgment was entered, nor could one be properly entered for Hicks.

Since Hicks was not entitled to any judgment while qualified immunity remained open he could not obtain damages, nominal or otherwise, on this record. Accordingly the district court, in its sound discretion, retained the power to impose a full panoply of sanctions for Hicks's refusal to submit to discovery. For the reasons set out *infra* we have concluded the district court did not abuse its discretion in imposing the sanction of dismissal.

which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense.

Poulis, 747 F.2d at 868 (emphasis in original). Not all of these factors need be met for a district court to find dismissal is warranted. A Rule 37(b)(2)(C) dismissal is a serious sanction. In certain cases, it is a necessary tool to punish parties who fail to comply with the discovery process and to deter future abuses. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32, 35-36 (3d Cir. 1979). This is such a case. *See Kabbe v. Rotan Mosle, Inc.*, 752 F.2d 1083 (5th Cir. 1985) (per curiam) (repeated willful failure of plaintiff to attend deposition warrants dismissal). Mindful of the fact that dismissal is a sanction of last resort, *Poulis*, 747 F.2d at 868, we will review the district court's balancing of the *Poulis* factors for abuse of discretion.

In this case Hicks failed to attend depositions, one in violation of the district court's order. Hicks attended approximately forty minutes of his deposition. After a brief recess, he failed to return to counsel's office. He failed to appear for two rescheduled depositions of which he had notice. He informed his attorney that he did not want to discuss "what he believed to be extremely private matters concerning what happened to him while he was confined at the Delaware State Hospital." App. at A-54. Hicks stated that he would not appear at any further depositions because "he valued his privacy concerning these matters more than any compensatory damages that the court might award." *Id.* On July 16, 1986 the district court ordered Hicks to appear at a deposition on July 29, 1986, warning that failure to do so would result in sanctions under Rule 37, including dismissal of the case.

Given these facts, we cannot find that the district court abused its discretion in dismissing the case. A remand would tell the district court to ignore Hicks's willful conduct and simply weigh the relative prejudices to the parties. Hicks was personally responsible for failing to attend the depositions. As evidenced by his communications with his attorney, his conduct was willful. Review of the record reveals no conduct by Feeney's counsel to intimidate or harass Hicks, which could give Hicks reason to refuse further questioning. Hicks failed to return to his initial ongoing deposition and to appear at three subsequent depositions, one by court order. Hicks admitted that Feeney has suffered substantial prejudice by Hicks's failure to appear at the depositions. Feeney has a right to establish the facts concerning Hicks's treatment at DSH and the events surrounding his confinement there. Although we sympathize with Hicks's reluctance to recount the facts surrounding his incarceration at DSH, he is the plaintiff and as such must prove his case, as well as give the defendant an opportunity to prepare against it. *Cf. Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

The district court considered alternative sanctions to the dismissal of this case. In its July 16, 1986 order it warned Hicks that it would impose sanctions for failing to appear at the court-ordered deposition and assessed attorney's fees against him for failing to attend the two prior depositions. In its decision to dismiss, the district court considered whether further discovery from Hicks was necessary to establish plaintiff's claims. It also considered alternatives, such as precluding Hicks from testifying about his mental status in November 1982, prohibiting evidence rebutting DSH's medical records on Hicks, and finding

that Hicks suffered no actual injuries, thereby precluding compensatory damages. The court refused to allow the case to proceed on presumed and punitive damages without giving Feeney an opportunity to depose Hicks.

We agree with the district court that a lesser sanction was not appropriate. Without Hicks, this case becomes one for attorney's fees. Any argument that our statement in *Hicks II* that DSH's court commitment was "an established state procedure that required a pre-deprivation hearing" was a vindication of rights for purposes of attorney's fees under 42 U.S.C.A. § 1988 (West 1981) is foreclosed by *Hewitt v. Helms*, 107 S. Ct. 2672 (1987) (plaintiff must obtain some relief on merits to be considered "prevailing party" for attorneys fees under 42 U.S.C. § 1988). While we support the award of attorney's fees to prevailing parties in civil rights litigation, we fail to see how Hicks has prevailed in this case. We cannot find any benefit which Hicks has obtained. Every attorney who represents a Section 1983 civil rights plaintiff runs the risk of losing their client before they can establish "prevailing party" status. Attorney Bernstein has obviously committed a great deal of time and effort to this case and should be commended for it. It is unfortunate that those efforts may be without material compensation. However, we are unable to say that the district court abused its discretion in dismissing the case after Hicks lost all interest in pursuing his rights before he obtained any relief.

For these reasons, we will affirm the district court's dismissal of the case.

ROSENN, *Circuit Judge*, dissenting.

I believe that the district court's imposition of the extreme sanction of dismissal constituted an abuse of discretion. As both majority and the parties recognize, the question of appropriate sanction is influenced, if not determined, by the content of our disposition in *Hicks v. Feeney*, 770 F.2d 375 (3d Cir. 1975) (*Hicks II*). Under the circumstances, an order precluding plaintiff from establishing both actual and punitive damages would have provided an appropriate Rule 37(b) sanction. Accordingly, I respectfully dissent.

I.

On motion for summary judgment, the district court in *Hicks v. Feeney*, 596 F. Supp. 1504, 1508 (D. Del. 1984) (*Hicks I*), considered whether defendant's failure to comply with the Delaware Involuntary Commitment Statute, 16 Del Code Ann. ch. 50 (1983), resulted in a deprivation of plaintiff's constitutionally protected liberty interest in contravention of 42 U.S.C. § 1983. Relying on *Parratt v. Taylor*, 451 U.S. 527 (1981), the court held that Hicks' right to procedural due process was not violated based upon the existence of adequate state post-deprivation remedies. *Id.* at 1512. In the alternative, the district court additionally held that Feeney was entitled to qualified immunity. *Id.* at 1515.

On appeal, we reasserted the district court's conclusion that absent the application of *Parratt*, DSH's confinement procedures violated Hicks' liberty interest:

> Both sides agreed in open court that the procedure followed to commit Hicks violated a liberty interest protected by the fourteenth amendment. In light of Supreme Court precedent, any other position would be untenable. *See Vitek*

> *v. Jones*, 445 U.S. 480, 491 S.Ct. 1254, 1262, 63 L.Ed.2d 552 (1980) (involuntary commitment from prison to a mental hospital requires due process protection) (other citations omitted).

Hicks, 770 F.2d at 377. However, we reversed the court's reliance on *Parratt*, observing that DSH's court commitment procedure constituted an established "state custom or usage" requiring a pre-deprivation hearing.[1] *Id.* at 378-79. Next, we asserted that the district court's holding entitling Feeney to qualified immunity was predicated upon an incorrect interpretation of *People of Three Mile Island v. Nuclear Reg. Com'rs*, 747 F.2d 139 (3d Cir. 1984). We rejected the court's insistence upon a strict factual nexus between applicable precedent and the case before it in favor of "a more flexible approach requiring some factual correspondence and demanding that officials apply well developed legal principles to the instant case." *Id.* at 379-80. Accordingly, this court vacated the district court's order and remanded only the immunity claim for reconsideration. *Id.* at 380.

Remarkably, both the majority and the district court somehow conclude that *Hicks II* failed to establish, as a matter of law, whether the plaintiff was deprived of liberty without due process of law. In response to plaintiff's argument that absent resolution of the immunity question, *Hicks II* determined Feeney's liability, the majority observes:

> Reviewing *Hicks II*, we do not find such a holding. In *Hicks II* we held that the district court erred in applying the post-deprivation remedy to section 1983 violations of *Parratt v. Taylor*, supra.

(Maj. typescript op. at 6).

---

1. The district court held that Hicks' confinement resulted from a "random and unauthorized act" of a state officer, rather than from the "state system itself." *See Hicks*, 770 F.2d at 378.

The majority wholly ignores the effect of our rejection of *Parratt*, which necessarily implies a violation of the due process clause. *Parratt* held that when officials act in a random and unauthorized fashion, the state is unable to anticipate the circumstances in which a property loss will occur, and therefore is unable to provide a hearing *before* the deprivation takes place. *See Hicks*, 770 F.2d at 378. Thus, the district court in *Hicks I* asserted that because DSH officers were not acting pursuant to established state custom or usage, the availability of post-deprivation state remedies satisfied the due process clause. Based upon our conclusion that *Parratt* was inapplicable, we held that the plaintiff was entitled to a *pre-deprivation* hearing before he could be involuntarily confined. Because the parties conceded that Hicks was not accorded the requisite hearing, our holding can only be interpreted to establish the deprivation of a constitutionally protected liberty interest.

My conclusion is additionally supported by our instruction to the district court to consider on remand *only* the issue of Feeney's qualified immunity. *Id.* at 380. Had a legal or factual element of Hicks' liberty deprivation remained undetermined, our directive undoubtedly would have acknowledged it. Instead, this court's instruction recognized that, in addition to the extent of plaintiff's damages, the only remaining issue in the litigation was Feeney's immunity. Thus, as plaintiff's counsel cogently observes, the denial of Hicks' liberty interest became "the law of the case" on remand. *See Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985) (on remand, trial court may not reconsider those issues not expressly or implicitly disposed of by appellate decision). As we observed in *Cowgill v. Raymark Industries, Inc.*, 832 F.2d 798, 802 (3d Cir. 1987), "[w]hen a court of appeals reverses a judgment and

remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations of the trial court normally continue to work an estoppel."

The majority attempts to justify its conclusion that *Hicks II* failed to decide the due process issue by noting: "We made no findings as to whether a hearing took place and if not, why not." (Maj. typescript op. at 7). The majority's response is inexplicable given the fact that *Hicks II* constituted an appeal from a *summary judgment* order; the parties *conceded* that *no* hearing occurred prior to Hicks' confinement. Finally, the majority's inquiry into "why" DSH failed to accord Hicks a hearing is irrelevant, or at least, not within the scope of plaintiff's knowledge. In light of the foregoing, I now consider the issue of appropriate sanction.

II.

As the majority observes, it is well settled that a district court has discretion to issue sanctions for failure to comply with discovery orders. *Ali v. Sims*, 788 F.2d 954, 957 (3d Cir. 1986); *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). However, we have additionally noted that "dismissal is a drastic sanction;" a court should be reluctant to deprive a litigant of the right to have his claim adjudicated on the merits. *Titus v. Mercedes Benz of North America*, 695 F.2d 746, 749 (3d Cir. 1982). Accordingly, the following factors are relevant in determining a proper sanction:

> (1) the extent of the *party's* personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party

> or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense.

Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984). Two additional criteria limit the exercise of a court's discretion -- the sanction must be "just" and must be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). I agree with the majority's conclusion that three of the *Poulis* factors -- namely, party responsibility, history of dilatoriness, and willful party conduct, weigh in favor of dismissal. However, my analysis of the remaining factors leads to the imposition of a less severe sanction.

As a result of *Hicks II*, the remaining issues properly before the district court on remand were the extent of plaintiff's damages, and whether Feeney was entitled to qualified immunity. Importantly, Hicks' refusal to testify to the details of his confinement prejudiced Feeney *only* in his attempt to defend against proof of damages. The majority suggests, however, that Hicks' conduct somehow precluded Feeney from establishing qualified immunity:

> Certainly *Hicks II* announced some controlling legal principles but it is equally clear that Hicks could not have obtained any judgment until the qualified immunity issue was resolved. Even though the discovery does not on its face seem related to the qualified immunity issue, that issue was never reached and until it was decided no judgment was entered nor could one be properly entered for Hicks.

> Since Hicks was not entitled to any judgment while qualified immunity remained open he could not obtain damages, nominal or otherwise, on this record.

(Maj. typescript op. at 7-8 n.4).

Although the existence of qualified immunity would have indeed barred plaintiff's recovery, it is unclear how Hicks' refusal to testify in any way prejudiced Feeney in establishing that defense. Because qualified immunity is an affirmative defense, the burden of proof is on the party seeking to invoke it. *See Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976). The Supreme Court has asserted that a party is entitled to qualified immunity as long as his actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Because the qualified immunity inquiry is predicated upon determining what the *defendant* knew about extant legal norms at the time of the alleged liberty deprivation, Feeney could not have been prejudiced by *plaintiff's* refusal to be deposed. The evidence, if any, relating to that defense lay solely in Feeney's control. Contrary to the majority's conclusion, the district court could have determined the immunity issue on the record before it and rendered final judgment accordingly.

I agree with the majority's conclusion that Hicks' unwillingness to be deposed prejudiced Feeney's ability to defend against proof of damages.[2] However, given

---

2. In considering the effect of Hicks' conduct, the majority observed that Feeney was "prevented from preparing a defense as to the issue of (1) whether his failure to follow constitutionally required procedure caused Hicks' alleged damages; (2) whether

Hicks II's establishment of a due process violation, fairness dictates that barring plaintiff from proving both actual and punitive damages constitutes a proper alternative sanction to dismissal. *See Coca-Cola*, 110 F.R.D. at 369 (existence of alternate sanctions most important *Poulis* factor). Because the district court's discovery order was relevant *only* to damages, the proposed alternative sanction negates any prejudice resulting from Hicks' conduct. *See Insurance Corp. of Ireland*, 456 U.S. at 707. On the other hand, dismissal under these circumstances effectively condones defendant's liberty deprivation, thereby contravening our strong presumption against sanctions that decide the issues of a case. *See Ali*, 788 F.2d at 958.

Concededly, adoption of the alternative sanction would entitle plaintiff to nominal damages based upon defendant's due process violation, and in the event that the district court rejected Feeney's qualified immunity defense, to an award of attorney's fees pursuant to 42 U.S.C. § 1988. *See Carey v. Piphus*, 435 U.S. 247, 266 (1977) (denial of procedural due process is actionable under section 1983 for nominal damages without proof of actual injury). The majority, however, rejects plaintiff's entitlement to nominal damages, noting that Hicks' conduct has improperly transformed this suit into "one for attorney's fees."[3] (Maj. typescript op. at

---

Hicks would have remained at DSH even if the procedures had been followed; and (3) Hicks' actual damages. (Maj. typescript op. at 7). Each of these factors related to damages and not to liability.

3. Similarly, the district court predicated its rejection of an alternative sanction by asserting that Hicks "has lost whatever motivation he may have had to diligently pursue this lawsuit." The court's conclusion is undermined by its own observation that Hicks' refusal to be deposed derived from his embarrassment concerning the details of his confinement. Finally, Hicks' initiative to pursue this litigation is supported by his timely response to defendant's interrogatories.

11). I disagree. At its essence, this action concerns defendant's erroneous and unconstitutional confinement of plaintiff at DSM for fifty-four days. The Supreme Court has continually vindicated deprivations of "absolute rights" that have not caused actual injury through the award of nominal damages. *See Carey*, 435 U.S. at 266. As the Court observed in *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986):

> And Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. . . ." (citation omitted) Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relative small damages awards.

Thus, I believe that Hicks' conduct has not obscured what remains as the preeminent issue in this case -- the vindication of a constitutionally protected liberty interest.

The majority attempts to supports its narrow construction of the remaining issues in this action by noting that because plaintiff is not a "prevailing party" within the meaning of section 1988, he is not entitled to attorney's fees. (Maj. typescript op. at 11). *See Hewitt v. Helms*, 107 S.Ct. 2672 (1987). The majority correctly implies that Hicks can be a prevailing party *only if* Feeney is not entitled to qualified immunity. However, as I have already noted, plaintiff's refusal to be deposed is irrelevant to the resolution of the qualified immunity issue. Thus, plaintiff's failure to attain prevailing party status derives from the *district court's* erroneous failure to consider the qualified immunity issue on remand, and not from Hicks' conduct.

Finally, I believe that neither the majority nor the district court should have considered counsel's entitlement to attorney's fees in determining appropriate sanctions. As the plaintiff observes, Hicks' entitlement to attorney's fees "was not a claim which was at issue in the order to provide discovery." *See Insurance Corp. of Ireland*, 456 U.S. at 707. Indeed, the Supreme Court has asserted that an attorney's fee award under section 1988 is not "compensation for the injury giving rise to an action. [The] award is uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 452 (1982).

III.

Therefore, although I would preclude plaintiff from establishing both actual and punitive damages, I would remand the case, as we initially did in *Hicks II*, for a determination only of Feeney's entitlement to qualified immunity and for such final disposition as is consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROY HICKS, Plaintiff,	:	
vs.	:	C.A. No. 83-185 LON
ROBERT C. FEENEY, Defendant.	:	

Joseph M. Bernstein, Esquire, Wilmington, Delaware, attorney for Plaintiff.

Marcia Rees, State Department of Justice, Wilmington, Delaware, attorney for Defendant.

MEMORANDUM OPINION

July 14, 1987
Wilmington, Delaware

LONGOBARDI, District Judge

Plaintiff brought this civil rights action under 42 U.S.C. §1983 claiming that his confinement at the Delaware State Hospital deprived him of a liberty interest in violation of the Fourteenth Amendment to the United States constitution. On November 8, 1984, this Court held that while plaintiff had been deprived of a liberty interest, that deprivation had not occurred without due process of law. Hicks v. Feeney, 596 F.Supp. 1504 (D.Del. 1984). This Court based its decision on the ground that post-deprivation remedies were available to Plaintiff and that under Parratt v. Taylor, 451 U.S. 527 (1981), he was, therefore, unable to make out a claim under Section 1983.

On appeal, the Third Circuit vacated the Order of this Court, holding that the Parratt post-deprivation remedy exception did not apply to this case. Hicks v.

Feeney, 770 F.2d 375 (3d Cir. 1985). The Third Circuit also remanded the action to this Court for reconsideration of Defendant Feeney's immunity claim in light of the Supreme Court's recent decision in Mitchell v. Forsyth, 472 U.S. 511 (1985).

Upon remand to this Court, Defendant Feeney initiated discovery efforts. Defendant duly noticed the deposition of Plaintiff for January 16, 1986. Docket Item ("D.I.") 46. Plaintiff appeared at the deposition but, after approximately forty minutes of questioning, refused to answer certain questions concerning Exhibit 1 to his deposition. Deposition Transcript, D.I. 54, at 30. Plaintiff was apparently disturbed by not having been given a copy of the exhibit prior to his deposition. Id. at 29. In order to accommodate Plaintiff's concerns, counsel agreed to recess the deposition for one hour. Id. at 30-31. Plaintiff never returned to the deposition. Id. at 31-32.

On January 30, 1986, Defendant again duly noticed Plaintiff's deposition. D.I. 53. Plaintiff never appeared for the scheduled deposition. D.I. 61.

On February 26, 1986, Defendant moved to compel Plaintiff's deposition. D.I. 55. Before the Court could rule on the motion, Defendant again noticed Plaintiff's deposition. D.I. 58. Once again, Plaintiff failed to appear. D.I. 61.

On July 9, 1986, Plaintiff's attorney informed the Court that he had discussed with Plaintiff the need to comply with discovery requests and the potential sanctions he faced for his failure to cooperate. Letter of Joseph Bernstein, Esquire to the Honorable Joseph J. Longobardi dated July 9, 1986. Mr. Bernstein explained both in his letter and in a telephone conference held on July 11, 1986, that Plaintiff probably would not respond to additional deposition notices

due to his embarrassment about the subject matter of this litigation.

On July 16, 1986, citing Plaintiff's steadfast refusal to cooperate with Defendant's proper attempts to gain discovery, the Court ordered Plaintiff to appear for a deposition on July 29, 1986. The Court admonished Plaintiff that if he did not appear at the deposition and cooperate, the Court would impose sanctions under Rule 37 of the Federal Rules of Civil Procedure. In spite of the Court's Order and in spite of its warnings regarding sanctions, Plaintiff failed to appear at the deposition. D.I. 64.

Not surprisingly, Defendant has now moved for sanctions under Rule 37. Defendant seeks dismissal of this action together with an award of attorney's fees and costs. For the reasons discussed below, Defendant's motion is granted.

Defendant's motion for sanctions is based on Federal Rule of Civil Procedure

37(b)(2) which permits the imposition of sanctions against a party who fails to obey a court order to provide or permit discovery. As discussed below, the Court concludes that dismissal is appropriate under Rule 37(d) which permits the imposition of sanctions against a party who fails to appear for his deposition or otherwise fails to provide discovery. By its terms, Rule 37(d) does not require violation of a court order before sanctions may be imposed. See, Al Barnett & Son, Inc. v. Outboard Marine Corp., 611 F.2d 32, 35 (3d Cir. 1979). Thus, given Plaintiff's conduct in this case, dismissal is justified under either Rule 37(b)(2) or Rule 37(d).[1]

The Court notes at the outset that dismissal is a drastic sanction which

---

[1] At oral argument, the Court raised the issue of the appropriateness of imposing sanctions under Rule 37(d) and provided Plaintiff an opportunity to address it. D.I. 70 at 29.

"should be reserved for those cases where there is a clear record of delay or contumacious conduct by the Plaintiff." Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 342 (3d Cir. 1982). A motion to dismiss must be approached with extreme caution, for courts must be reluctant to deprive a plaintiff of the opportunity to have his claim adjudicated on the merits. Titus v. Mercedes Benz of North America, 695 F.2d 746, 749 (3d Cir. 1982); Donnelly, 677 F.2d at 341. The courts have not hesitated to invoke the extreme sanction of dismissal, however, where a plaintiff has frustrated the purposes of discovery. In Al Barnett, 611 F.2d 32, for example, the Third Circuit upheld the dismissal of an action against several plaintiffs who failed to answer interrogatories, appear at their scheduled depositions or produce requested documents. While the Court was fully cognizant of the harshness of dismissal, it noted that plaintiffs, having

flagrantly ignored their discovery obligations, had brought that sanction upon themselves. Id. at 36. Dismissal, "although severe, is a necessary tool, both to punish in the individual action and to deter future abuses of the discovery process." Id.[2] Thus, as the Supreme Court

---

[2] See also, Kabbe v. Rotan Mosle, Inc., 752 F.2d 1083 (5th Cir. 1985) (plaintiff's failure to appear for her deposition on three occasions, the final appearance having been ordered by the court, justified dismissal); Hashemi v. Campaigner Publications, Inc., 737 F.2d 1538 (11th Cir. 1984) (Where plaintiff repeatedly failed to appear and give deposition testimony, dismissal was appropriate); Hindmon v. National Ben Franklin Life Ins. Corp., 677 F.2d 617 (7th Cir. 1982) (Dismissal warranted where plaintiff, despite court's warning that failure to cooperate with discovery requests would result in sanctions, failed to appear at deposition, failed to produce requested documents and failed to properly answer interrogatories); Bonaventure v. Butler, 593 F.2d 625 (5th Cir. 1979) (Plaintiff's repeated failure to appear for his deposition, the last appearance having been ordered by the court, warranted dismissal); Yannitelli v. Navieras de Puerto Rico, 106 F.R.D. 42 (S.D.N.Y. 1882) (Plaintiff's repeated failure to attend depositions, despite court order to do so, justified dismissal); Fisher v. Henderson, 105 F.R.D. 515 (N.D.Tex. 1985) (Plaintiff's failure to appear for her deposition on three occa-

has recognized, dismissal, the "most severe in the spectrum of sanctions...must be available to the district court in appropriate cases." National Hockey League v. Met. Hockey Club, 427 U.S. 639, 643 (1976).[3] As the discussion below illustrates, the Court believes that this is just such a case.

---

sions, coupled with other discovery failures, rendered dismissal appropriate); Arthur v. Starrett City Associates, 98 F.R.D. 500 (E.D.N.Y. 1983) Dismissal warranted where plaintiff failed to appear at deposition and could not be located); Wright v. Maritime Overseas Corp., 96 F.R.D. 686 (N.D. Cal. 1983) (Dismissal appropriate in light of plaintiff's failure to attend five scheduled depositions, failure to comply with Magistrate's Order to appear at deposition, inability to be located, and refusal to provide verified discovery responses); Gorod v. United States, 86 F.R.D. 225 (D.Mass. 1980) (Plaintiff's refusal to answer interrogatories, despite court order to do so, together with refusal to appear at depositions, warranted dismissal).

[3] See also, Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 867 n.1 (3d Cir. 1984) ("[W]e have not hesitated to affirm the district court's imposition of sanctions, including dismissals in appropriate cases").

The Court's analysis must begin with consideration of the factors set forth in Poulis, 747 F.2d at 868. See, Ali v. Sims, 788 F.2d 954 (3d Cir. 1986); Ennis v. New Jersey Bell Telephone Co., 782 F.2d 396 (3d Cir. 1985), cert. denied, 106 S.Ct. 1461 (1986). In Poulis, the District Court dismissed the plaintiff's complaint due to their counsel's failure to comply with court-imposed deadlines and other procedural requisites. In upholding the dismissal, the Third Circuit explained that its review of the District Court's dismissal was guided by the trial court's balancing of the following factors: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary by the party's conduct; (3) a history of dilatoriness; (4) whether the conduct of the party or attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of

the claim. 747 F.2d at 868. The Court will address each of these factors in turn.

1. EXTENT OF THE PARTY'S PERSONAL RESPONSIBILITY

Where a party's attorney, rather than the party himself, is responsible for a failure to provide discovery or comply with a Court order, dismissal may be an unduly harsh sanction. There is no doubt here, however, that Plaintiff, and not his attorney, is personally responsible for the failure to provide discovery and for the violation of the Court's July 16, 1986 Order. It is Plaintiff who failed to return to the January 28, 1986 deposition and who failed to appear at each of the subsequently scheduled depositions. Plaintiff's attorney has made every effort to move this case forward and is in no way responsible for Plaintiff's failure to provide discovery. The first Poulis factor thus clearly weighs in favor of dismissing Plaintiff's complaint.

2. PREJUDICE TO THE ADVERSARY

As Plaintiff is forced to concede, Defendant has suffered substantial prejudice as a result of Plaintiff's repeated failure to appear at scheduled depositions. Plaintiff's Memorandum in Opposition to Defendant's Motion for Sanctions, D.I. 67 at 7. The discovery rules are designed to enable litigants to narrow and clarify the issues in dispute, to ascertain the facts underlying those issues and to ferret out the strengths and weaknesses of an adversary's case. See, Hickman v. Taylor, 329 U.S. 495, 500 (1947). Under the liberal discovery rules, civil trials are not to be carried on in the dark. Id. Instead, the parties are to be afforded opportunities to obtain the fullest possible knowledge of the issues and facts prior to trial. Id. Plaintiff has wholly deprived Defendant of the opportunity to avail himself of these important benefits. Without an adequate opportunity to take Plaintiff's deposition,

Defendant is unable to ascertain the facts underlying Plaintiff's claims, to test the efficacy of those claims or to gauge his credibility as a witness. To force defendant to proceed to trial under such constraints would unfairly hinder his ability to mount a defense.

3. HISTORY OF DILATORINESS

That Plaintiff's conduct in this litigation reflects a pattern of dilatoriness is readily apparent. Plaintiff did appear for his initial deposition but failed to return following a recess. On three subsequent occasions, Plaintiff failed to appear altogether at duly noticed depositions. Thus, on four separate occasions, Plaintiff has refused to cooperate with Defendant's legitimate discovery efforts.

The Court is unpersuaded by Plaintiff's argument that his appearance at his initial deposition, together with his cooperation in preparing responses to

interrogatories and requests for production, indicates that there has been no history of dilatoriness on his part. However cooperative Plaintiff may have been with regard to certain isolated discovery efforts, the fact remains that he has wholly frustrated Defendant's legitimate efforts to pursue discovery by way of deposition and he has done so repeatedly.

4. WHETHER PARTY'S CONDUCT WAS WILLFUL OR IN BAD FAITH

There is no question here that Plaintiff's refusal to cooperate with Defendant's discovery efforts has been willful. There has been no allegation that Plaintiff's mental state makes it difficult or impossible for him to appear at the deposition, nor any allegation that he is otherwise unable to do so.[4] Plaintiff was

---

4 Cf. Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958), quoted in National Hockey League, 427 U.S. at 640 (Dismissal is inappropriate where plaintiff's conduct is due to "inability, and not willfulness, bad faith, or any fault of [plaintiff]").

advised by both his counsel and the Court that failure to appear at the depositions could result in consequences adverse to his lawsuit and he indicated that he understood those potential consequences. D.I. 62 at 3-4; D.I. 70 at 20. Despite these admonitions, in the words of his own attorney, Plaintiff made a "conscious decision" not to appear. D.I. 70 at 19. As Plaintiff has admitted, his decision not to do so can be considered nothing other than willful. D.I. 67 at 3.

5. ALTERNATIVE SANCTIONS

The Court recognizes that dismissal "must be a sanction of last, not first, resort." Poulis, 747 F.2d at 869. For that reason, it is incumbent upon a trial court to explore the effectiveness of lesser sanctions before ordering the dismissal of a case. See, e.g., Donnelly, 677 F.2d at 342.

This Court has already attempted to use lesser sanctions to compel plaintiff to

appear at his deposition. In its July 16, 1986, Order compelling Plaintiff's appearance at his July 29, 1986 deposition, the Court ordered Plaintiff to pay the sum of $410.50 to Defendant for costs and fees incurred in preparing for and attending the depositions at which Plaintiff failed to appear. D.I. 62. In spite of the imposition of fees and costs, Plaintiff again failed to appear. The Court's efforts to utilize sanctions less than dismissal have thus met with utter failure.

Nonetheless, Plaintiff argues that dismissal is unwarranted and that lesser sanctions are appropriate. Plaintiff points to Coca-Cola Bottling Co. v. Coca-Cola Co., 110 F.R.D. 363 (D.Del. 1986), in which this Court explained that any sanction under Rule 37 must be "just" and must be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." Id. at 367 (quoting Transportes Aereos de Angola v.

Ronair, Inc., 104 F.R.D. 482 (D.De. 1985)). Coca-Cola, however, is of no help to Plaintiff here. While Plaintiff argues that, under Coca-Cola, dismissal is a sanction exceeding the scope of the specific claims upon which Defendant seeks discovery and that a preclusion order is therefore more appropriate, the Court disagrees.

In order to pursue the inquiry mandated by Coca-Cola, it is necessary to determine what issues remain to be litigated in tnis lawsuit. Plaintiff asserts that the only remaining issues are: (1) whether Defendant is entitled to immunity; and (2) the relief to which Plaintiff is entitled. The Court first notes that, contrary to Plaintiff's assertions, it does not believe that the Third Circuit has ruled as a matter of law that Plaintiff was deprived of liberty without due process. The Order of this Court appealed to the Third Circuit by Plaintiff held that

Plaintiff had been deprived of a liberty interest but that under the post-deprivation remedy exception established in Parratt, 451 U.S. 527, that deprivation had not occurred without due process. The Third Circuit vacated that Order; it did not reverse it. Thus, the issue of whether Plaintiff was deprived of liberty without due process also remains to be decided. As the discussion below illustrates, however, even assuming for the purposes of argument that liability has been established, the Court's conclusion that a preclusion order is not appropriate is no less warranted.

Plaintiff first suggests that the Court enter an Order precluding Plaintiff from testifying at trial concerning his mental status as of November, 1982. This suggestion is remarkable. First, Plaintiff apparently assumes that every statement he might make at trial would be favorable to his case. The Court is unwilling to make such an assumption. While perhaps not

doing so intentionally, it is certainly possible that Plaintiff would make statemerts, particularly on cross-examination, which would undermine his own case. The Court cannot and will not deprive defendant of the opportunity to elicit such testimony.

Secondly, it is critical to recognize that in a case such as this, where Plaintiff claims that as a result of unlawful commitment to a mental institution he suffered substantial injuries, it is imperative that the factfinder have an opportunity to observe the Plaintiff's demeanor as a witness. Without such an opportunity, the factfinder's ability to assess the viability of Plaintiff's claims would be severely hampered.

Plaintiff next suggests that the Court could prohibit the Plaintiff from introducing evidence to rebut facts contained in the medical records concerning his hospitalization at the Delaware State Hospital.

While this suggestion would certainly mitigate the prejudice to Defendant arising from Plaintiff's failure to appear at his deposition, it is simply not enough. This Court is firmly convinced that without an opportunity before trial to question Plaintiff in detail about his mental state and the facts surrounding his confinement and to thereby assess his credibility as a witness, Defendant's ability to proceed to trial would be unfairly infringed.

Plaintiff additionally suggest that the Court could enter an Order conclusively establishing that Plaintiff did not suffer any of the injuries claimed in his interrogatory answers. Plaintiff qualifies this proposal, however, by stating that any such Order "should not preclude an award of damages for the injuries which were conclusively established long before the present discovery problem arose." D.I. 67 at 8. Plaintiff asserts that it has already been "conclusively established" that he was

wrongfully confined at the Delaware State Hospital. According to Plaintiff, "[i]n such a case, real injury may be inferred from the conditions and length of confinement alone." Id. As the Supreme Court recently made clear, however, the mere fact that a constitutional right has been violated does not, in and of itself, entitle an individual to compensatory damages. Memphis Community School District v. Stachura, 106 S.Ct. 2537 (1986); see also, Carey v. Piphus, 435 U.S. 247 (1978). In order to recover compensatory damages, a party must demonstrate that he suffered some actual injury. Id.[5] Thus, if the Court were to adopt Plaintiff's proposal

---

[5] The Supreme Court's decision in Carey focused on the need to prove actual injury in connection with an alleged procedural due process violation. In Stachura, respondent argued that in the context of an alleged infringement of a substantive constitutional right, Carey does not control and actual injury therefore need not be proven. The Supreme Court squarely rejected that contention. 106 S.Ct. at 2544.

that an Order be entered conclusively establishing that Plaintiff did not suffer any of his claimed injuries, Plaintiff simply would not be entitled to recover compensatory damages.

The Court cannot enter such an Order. If Plaintiff were precluded from recovering compensatory damages, the case would proceed to trial on the basis of claims for nominal and punitive damages.[6] The dangers inherent in such an approach are clear. Despite Plaintiff's contrary assertions, the Court is not prepared to conclude that nothing Plaintiff could say at trial would affect his claim for punitive damages. In fact, Plaintiff's recollection of the events in question might well influence the factfinder in its resolution of the punitive damages claim. To force Defendant

---

[6] As this Court recently explained, punitive damages are available under section 1983 even in the absence of compensatory damages. Metcalf v. Long, C.A. No. 84-40 LON, Memorandum Opinion, at 2 n.2 (D.Del. Dec. 19, 1986).

to defend against a punitive damages claim without an opportunity to depose Plaintiff would thus result in unfair prejudice.

The obvious remedy for such prejudice would be an Order precluding plaintiff from recovering punitive as well as compensatory damages. At that juncture, all that would remain is plaintiff's claim for nominal damages together with a potential recovery of attorney's fees. While the vindication of constitutional rights is admittedly important and while it might be wholly proper to allow a plaintiff to proceed to trial solely on a claim for nominal damages in certain cases, this Court has grave doubts about allowing plaintiff to do so under the circumstances of this case. Plaintiff's conduct in this litigation indicates that he has lost whatever motivation he may have had to diligently pursue this lawsuit. It is plaintiff's attorney and not plaintiff himself who is attempting to move this case forward.

While the recovery of attorney's fees in civil rights cases serves an invaluable function in promoting the vindication of civil rights, the Court cannot condone a situation in which the recovery of attorney's fees has become the primary motivation for prosecuting a lawsuit.[7]

The Court has thus carefully considered the appropriateness of sanctions less than dismissal. For the reasons discussed above, the Court concludes that nothing short of dismissal will adequately protect Defendant against the prejudice arising from Plaintiff's refusal to appear at his deposition.

---

[7] The Court in no way intends to impugn the motives or integrity of Plaintiff's attorney, whose efforts in prosecuting his client's case have been commendable. The Court has no doubt that when Plaintiff's complaint was first filed, this was not an "attorney's fees case." See D.I. 70 at 22. But as Plaintiff's counsel was forced to concede at oral argument, Plaintiff's conduct may well have caused it to become one. Id. Under these circumstances, the Court simply concludes that the action should not be permitted to go forward.

6. MERITORIOUSNESS OF THE CLAIM

The final factor to be considered by the Court in deciding whether dismissal is appropriate is the meritoriousness of Plaintiff's claims. While the Third Circuit, in vacating this Court's Order, did not hold that Plaintiff had been deprived of liberty without due process, the Court's discussion indicates that the Plaintiff's claims do have some merit. It must be remembered, however, that while on their face Plaintiff's claims may appear meritorious, that meritoriousness may be tempered by Defendant's claim that he is entitled to immunity.

Even assuming, however, that Defendant is not entitled to immunity and that Plaintiff's claims are meritorious, the Court would still find dismissal appropriate. As this Court has noted, it is not necessary that each of the Poulis factors point to dismissal. Coca-Cola, 110 F.R.D. at 368 n.9. Regardless of the merits of Plain-

tiff's claims, he has wilfully obstructed Defendant's legitimate efforts to secure discovery. In so doing, he has substantially prejudiced Defendant's ability to defend against those claims.

CONCLUSION

Our judicial system is remarkable in its ability to provide a forum in which parties may resolve their private disputes. Once Plaintiff sought the protection of that system, he incurred certain obligations designed to facilitate the resolution of his claim. Plaintiff has flagrantly disregarded his obligations. If Plaintiff had an objection to the taking of his deposition, or to a particular line of questioning, it was incumbent upon him to seek a protective order from the Court. See Al Barnett, 611 F.2d at 35-36. He never did so. The Court cannot tolerate such an abuse. As this Court has previously explained, while the Court respects Plaintiff's desire to maintain his privacy,

justice requires that we protect the Defendant's interests as well. By his own conduct, Plaintiff has left the Court with no choice but to dismiss his lawsuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5820

ROY HICKS

Appellant

vs.

ROBERT C. FEENEY, individually and in his official capacity as Hospital Director of the Delaware State Hospital, a facility in the Division of Mental Health, Department of Health and Social Services State of Delaware

---

Appeal From the United States
District Court For the
District of Delaware
D.C. Civil No. 84-0185

Argued June 21, 1985

Before: ADAMS, HUNTER, and MANSMANN,
Circuit Judges

Opinion filed August 26, 1985

Joseph M. Bernstein (Argued)
820 Market Tower
9th & Market Streets
Wilmington, Delaware 19801
Attorney for Appellant

Marcia Rees (Argued)
Margaret S. Proctor
Deputy Attorney General
Department of Justice
State Office Building
820 North French Street
Wilmington, Delaware 19801
Attorneys for Appellees

OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. Roy Hicks appeals the order of the district court granting summary judgment to Robert C. Feeney, the former director of Delaware State Hospital ("DSH"). Hicks sued Feeney under 42 U.S.C. § 1983 (1982), alleging deprivation of procedural due process when he was involuntarily confined in DSH. For the reasons stated herein, we vacate the district court's order and remand for reconsideration of Feeney's immunity claim in light of *Mitchell v. Forsyth*, 53 U.S.L.W. 4798 (U.S. June 19, 1985).

I.

2. On November 18, 1982, the Delaware Family Court convicted Hicks of civil contempt after he telephoned his ex-wife in defiance of a court order. The Family Court sentenced Hicks to a thirty day suspended sentence and one year's probation. As a condition of his probation, the Family Court ordered that Hicks be committed to DSH for a period of seventy-two hours for evaluation and treatment, and, if recommended by DSH, for continued hospitalization "for such time as may be permitted by law, unless sooner discharged according to law."

3. The Delaware Involuntary Commitment Act Del. Code Ann. tit. 16 ch. 50 (1983), prohibits the involuntary commitment of any person unless a

tripartite procedure is followed. *Id.* at § 5002. The individual may be provisionally admitted pursuant to the particularized, written certification of a psychiatrist that hospitalization is necessary. *Id.* at § 5003. Next, the Act requires DSH to examine the individual and to provide, within three days of admission, a written certification as to whether the individual is mentally ill. *Id.* at § 5005. If he is mentally ill, DSH must file, within six days of the provisional admission, a verified complaint with the proper state court seeking the patient's involuntary commitment. *Id.* at § 5007.

4. None of this happened to Hicks. He was sent straight from Family Court to DSH where the admitting physcian found Hicks to be alert and cooperative. On November 23, five days after Hicks's admission, Dr. William Levy, the Director of Forensic Psychiatric Services at DSH, wrote the committing judge indicating that "our initial impression" is that Hicks suffered from a "psychiatric condition" requiring further evaluation. A day later, Dr. Levy wrote the judge that Hicks exhibited the signs and symptoms of "a major mental illness" and recommended civil commitment. Not until almost three weeks after this correspondence, however, did DSH prepare the written determination of mental illness required by the Delaware Involuntary Commitment Act. DSH filed the verified complaint in Delaware Superior Court on December 27, 1982, thirty-nine days after Hicks's admission. Before the complaint could be heard, however, DSH released Hicks on January 12, 1983, concluding that he suffered only from an "adjustment disorder." Hicks spent a total of 54 days in DSH.

5. The district court concluded that the confinement procedures used in this case deprived Hicks of his fourteenth amendment procedural due process right under color of state law. The district

court also concluded that Hicks's commitment resulted from the "unauthorized failure of agents of the State to follow established state procedure," *citing Parratt v. Taylor*, 451 U.S. 527, 543 (1981), and that the post-deprivation remedies provided by state law provided adequate procedural due process under *Parratt*. Alternatively, the district court found that even if DSH deprived appellant of his fourteenth amendment right to procedural due process that Feeney was entitled to qualified immunity from section 1983 liability under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Hicks appeals the last two findings.

II. The Procedural Due Process Claim

6. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In any § 1983 action, the court must first make an inquiry to ascertain the presence of the two essential elements to a § 1983 claim: whether the alleged conduct was committed by a person acting under color of state law and whether the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt*, 451 U.S. at 535.

7. Both sides agreed in open court that the procedure followed to commit Hicks violated a liberty

interest protected by the fourteenth amendment. In light of Supreme Court precedent, any other position would be untenable. *See Vitek v. Jones*, 445 U.S. 480, 491 (1980) (involuntary commitment from prison to a mental hospital requires due process protection); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection); *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975) (state cannot confine a non-dangerous individual in a mental hospital); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (involuntary commitment to a mental hospital produces a "massive curtailment of liberty").

8. Since *Monroe v. Pape*, 365 U.S. 167 (1961), the first prong of *Parratt*'s inital inquiry can be satisfied by a showing of either a deprivation caused by state officers acting pursuant to a state "custom or usage" or by the misuse of official power possessed by virtue of state law. After *Parratt*, *supra*, and *Hudson v. Palmer*, ___ U.S. ___, 104 S.Ct. 3194 (1984), this distinction also indicates whether post-deprivation state remedies might suffice to satisfy due process concerns, at least with respect to deprivations of property interests. Under *Parratt* and *Hudson*, if the deprivation is the result of the random and unauthorized conduct of a state employee, *i.e.*, a misuse of official power, it is impractical for the state to provide pre-deprivational due process and the inquiry then focuses on the adequacy of state post-deprivation remedies. *See Hudson*, 104 S.Ct. at 3203. If, on the other hand, the deprivation occurs under color of state law pursuant to state law, custom, or usage, *Parratt* and *Hudson* do not apply because the state is able to anticipate the circumstances in which the loss will occur and to provide a meaningful hearing before the deprivation takes place. *Parratt*, 451 U.S. at 541; *Hudson*, 104 S.Ct. at 3203.

9. Both *Parratt* and *Hudson* were decided in the context of prisoners' property interests and do not address the issue at hand, the deprivation of a liberty interest. We recently noted in *Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1984) (in banc), *cert. granted sub nom. Davidson v. Cannon*, 53 U.S.L.W. 3852 (U.S. June 3, 1985), that a § 1983 action will lie for "infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference, or an established state procedure," and that "[t]he viability of such § 1983 actions does not depend on whether or not a postdeprivation remedy is available in state court." *Id.* at 828 (footnote omitted). The increased protection we provide liberty interests in § 1983 actions is premised upon the proposition that it is "untenable that the Court intended [in *Parratt* and *Hudson*] to subject all suits for unconstitutional acts under color of law, including those implicating a liberty or life interest, to a state remedy, if available." *Id.*

10. Because the district court found that Hicks's deprivation resulted from the "random and unauthorized act" of a state officer rather than from the "state system itself," the district court applied the *Hudson* and *Parratt* analysis and examined the state remedies available to Hicks. Although Hicks's admission and confinement violated both the Delaware Involuntary Commitment Act and DSH's internal regulations, DSH in fact observed its usual procedure for court commitments, a procedure separate from and supplementary to the procedures in the Act and DSH's regulations. According to Feeney's affidavit:

> The normal procedure utilized by the Delaware State Hospital in such court commitments is to evaluate the patient's physical and mental health needs and report the findings of this evaluation back to the court, often including recommendations

> concerning the utility of civil commitment. Unless the initial commitment directs otherwise, if the Delaware State Hospital believes that a court-committed patient should be civilly committed, the patient will be held at Delaware State Hospital until further instructions are received from the court.

DSH's court commitment procedure thus constituted an established state procedure that required a pre-deprivation hearing.[1]

11. We hold therefore that the district court erred in finding *Parratt*'s post-deprivation remedy exception to § 1983 violations applicable to this case.

III. The Immunity Defense

12. Alternatively, the district court found Feeney, in his capacity as director of DSH, entitled to a defense of qualified immunity from monetary damages.[2] The court reasoned that Feeney could not be said to have violated any "clearly established" rights of Hicks under the standard of *Harlow v. Fitzgerald*, 457 U.S. 800,

---

1. We note in passing that although the district court's order predates our opinion in *Davidson*, DSH's court commitment policy equally requires a pre-deprivation hearing under *Parratt* and *Hudson*.

2. In rejecting Feeney's assertion of absolute immunity, the district court noted that as director of DSH, Feeney was an executive entitled only to qualified immunity under *Harlow*. Slip op. at 19 n.11. In *Mitchell v. Forsyth*, 53 U.S.L.W. 4798 (U.S. June 19, 1985), the Supreme Court refined *Harlow*'s discussion of the governmental functions afforded absolute immunity. *Forsyth*, 53 U.S.L.W. at 4800-02. Both *Harlow* and *Forsyth* teach that absolute immunity is a "functional immunity," related to the particular functions performed by the office rather than the broad characterization of the office as executive or ministerial. *Forsyth*, 53 U.S.L.W. at 4800; *Harlow*, 457 U.S. at 807.

818 (1982)[3] because the constitutional rights of appellant as a probationer involuntarily committed to a mental hospital had yet to be defined. In so doing, the district court noted existing precedent which indicated that due process requires that a prisoner transfered to a mental hospital be afforded a hearing prior to involuntary commitment, *Vitek v. Jones*, 445 U.S. 480, 495-96 (1980), but believed that the case was not sufficiently factually congruent to establish Hicks's rights or even constitute applicable law.

13. Qualified immunity from suits for civil damages brought under § 1983 is a common law immunity that balances the need to compensate and to vindicate the rights of victims of constitutional torts with a concern that too broad a liability may cause public officials to refrain unnecessarily from discretionary decisions. *See People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 143 (3d Cir. 1984). It protects officials from unexpected liability by shielding them from monetary damages if their conduct conforms to that of the reasonable actor: "governmental officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *People of Three Mile Island*, *supra*, 747 F.2d at 144 (quoting *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818). *See Mitchell v. Forsyth*, 53 U.S.L.W. 4798, 4803 (U.S. June 19, 1985). *Harlow*

---

3. Although *Harlow* involved a *Bivens*-type constitutional tort claim, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 402 U.S. 388 (1971), the elements of immunity for state officials sued under section 1983 and federal officials sued in a *Bivens*-type action are identical. *See Harlow*, 457 U.S. at 818 n.30 (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

leaves us with a puzzle, however, as to when a constitutional right should be considered "clearly established."

14. Problems in determining the requisite degree of factual correspondence between the applicable precedents and the case at issue make it difficult to define just what is "clearly established." *People of Three Mile Island*, 747 F.2d at 144. Under the so-called strict standard, courts require near factual identity between the cases. *See e.g., Calloway v. Fauver*, 544 F. Supp. 607 (D.N.J. 1982) (although legal principles clearly established, qualified immunity granted because specific question not yet resolved). This circuit recently rejected the strict standard in favor of a more flexible approach requiring some factual correspondence and demanding that officials apply well developed legal principles to the instant case. *People of Three Mile Island*, 747 F.2d at 144. The standard involves an inquiry into the general legal principles governing analogous factual situations, if any, and a subsequent determination whether the official should have related this established law to the instant situation. *Id.* This approach eliminates unexpected liability for public officials as well as prevents the occurrence of a mere "factual wrinkle" in an area of clearly established law from barring suit altogether. *Id.* at 148.

15. Because the district court erred in its application of *People of Three Mile Island* by requiring strict factual correspondence, we vacate its order granting qualified immunity to Feeney. On remand, the immunity analysis should focus on whether it was clearly established that Hicks could be involuntarily confined at DSH after the initial 72-hour period ordered by the family court judge. The district court's prior analysis focused on whether it was clearly established that a court could condition its grant of

probation on an individual's being placed in a mental hospital, but that is not at issue here. Hicks does not contend that the initial 72-hour period ordered by the state judge violated the fourteenth amendment. Rather, plaintiff asserts that his involuntary confinement at DSH for another 51 days without any hearings violated his rights. Thus, Feeney's entitlement to qualified immunity hinges on whether it was clearly established that Hicks's confinement after the initial 72-hour period violated his constitutional rights. In considering this issue, the district court should examine the family court's order sending Hicks to DSH for 72 hours and permitting further hospitalization "for such time as may be permitted by law." Of course, if the district court finds that the applicable legal principles governing involuntary commitment are uncertain, Feeney should be granted immunity as unexpected monetary damages would unfairly force officials to guess the development of constitutional law. *See Forsyth*, 53 U.S.L.W. at 4803-05; *Pierson v. Ray*, 386 U.S. 547, 557 (1967).[4]

---

4. The district court also rejected appellant's claim that Feeney violated a liberty interest created by the Delaware Involuntary Commitment Act. Although not presented as an issue for review, appellant's brief suggests that the Act's procedures create a federally protected liberty interest and that Feeney's failure to follow them deprived Hicks of due process.

In *Davis v. Scherer*, ___ U.S. ___, 104 S.Ct. 3012 (1984), the Supreme Court observed that state officials sued for the violation of rights conferred by state statute or regulation forfeit their immunity from damages "only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages." *Id.* at 3020 n.12. Thus, if the Delaware Involuntary Commitment Act gives rise to a liberty interest that forms the basis of the present action, Feeney may lose his qualified immunity for conduct clearly violative of the Act.

On remand, the district court should consider whether the Involuntary Commitment Act creates a liberty interest which forms

IV.

16. After the district court's opinion and just prior to argument in this case, the Supreme Court decided the *Forsyth* case. Because the district court did not have the benefit of this opinion, we vacate the district court's order and remand for reconsideration of Feeney's immunity claim in light of *Forsyth*.

---

the basis of a § 1983 action, using the standard enunciated in *Hewitt v. Helms*, 459 U.S. 460, 466, 471-72 (1983) and *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). If the court finds such an interest, it should then consider appellant's due process claim in light of *Davis*. *See id.* at 3020 n.12, 3021 n.14; *c.f. Spruytte v. Walters*, 753 F.2d 498, 507-08 (6th Cir. 1985) (finding a property interest protected by the due process clause of the fourteenth amendment). *See also Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (Powell, J., and Blackmun, J., concurring in part and concurring in the result in part) (presence of a legitimate "property" or "liberty" interest within the meaning of the fifth or fourteenth amendment prerequisite to constitutional due process protection). We express no opinion, however, as to whether the Delaware Involuntary Commitment Act creates a liberty interest.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROY HICKS, Plaintiff,	:	
vs.	:	C.A. No. 83-185 LON
ROBERT C. FEENEY, Defendant.	:	

Joseph M. Bernstein, Esquire, Wilmington, Delaware, attorney for Plaintiff.

Matthew J. Lynch, Jr., Esquire, State Department of Justice, Wilmington, Delaware, attorney for Defendant.

OPINION

Dated: November 8, 1984
Wilmington, Delaware

LONGOBARDI, District Judge

This case is a civil rights action brought under 42 U.S.C. §1983. The Plaintiff, Roy Hicks ("Hicks"), was formerly a patient at the Delaware State Hospital ("DSH"). The Defendant, Robert C. Feeney ("Feeney"), the director of the DSH, is a defendant in both his individual and official capacities. The Plaintiff seeks declaratory and injunctive relief against the Defendant in his official capacity and compensatory damages from him as an individual.

The basis for the complaint is that Hicks was confined at DSH without legal authority and the confinement deprived him of a liberty interest in violation of the fourteenth amendment of the United States Constitution. The Plaintiff also alleges that even if his confinement by the Hospital was entirely lawful, his fourteenth amendment liberty interest was still violated because he was not granted the

least restrictive conditions of possible confinement.

Background

Presently before the Court are cross motions for summary judgment. The facts underlying the claims are not in dispute. On November 18, 1982, the Plaintiff was found guilty of contempt of court by Family Court Judge Jay H. Conner. Judge Conner sentenced Hicks to 30 days in jail and suspended the sentence in favor of one year's probation. Two of the conditions of probation were that Hicks present himself at DSH for a period of 72 hours for evaluation and then follow the Hospital's recommendation for continued treatment or hospitalization. The commitment order signed by Judge Conner authorized Hicks to stay in DSH "for such time as may be permitted by law, unless sooner discharged according to law."

Hicks was sent directly to DSH from Family Court and arrived on the afternoon

of November 18, 1982. Upon admission, he was examined by Dr. Felix Vergara and assigned to the Comegys Building. Shortly thereafter, he was examined by the forensic treatment team, who concluded that the "court is to be informed of the situation that the patient needs some in-patient treatment gradually phased to an out-patient program."

On November 23, 1982, 5 days after Hicks' admission, Dr. Levy, a member of the forensic team, wrote to Judge Conner that Hicks required further evaluation at DSH. On November 24, Dr. Levy again wrote to the judge and stated that Hicks had "been exhibiting signs and symptoms of a major mental illness...It is recommended that he receive further treatment...by way of a Civil Commitment."

No formal action was initiated until almost 3 weeks later. On December 13, 1982, Dr. Levy prepared a certificate determining that Plaintiff was mentally

ill. A verified complaint seeking a judicial determination of Plaintiff's mental status was signed by Defendant Feeney on December 20, 1982, and was filed in the Superior Court on December 27, 1982. The complaint noted that Hicks was "provisionally admitted as an involuntary mental patient on December 13, 1982."

On December 22, 1982, Hicks was transferred to the M-2 ward from the Comegys Building, a building designed to house criminals who were mentally disturbed.

After the complaint seeking a hearing on Hicks' mental status was filed on December 27, the Superior Court scheduled a probable cause hearing for January 14, 1983. That hearing never took place because the Plaintiff was discharged from the Delaware State Hospital on January 12, 1983.

Statutory Involuntary Commitment Procedure

The Plaintiff contends that the events surrounding his stay at DSH must be

examined in light of the provisions of the Delaware Involuntary Commitment Statute, 16 Del.C., Ch. 50, and the fourteenth amendment. The Involuntary Commitment Statute limits the power of the State to involuntarily confine an individual in a mental hospital, 16 Del.C. §5002, and establishes a three step procedure for the involuntary commitment of an individual. The first step requires that an individual be provisionally admitted on pursuant to the particularized written certificate of a psychiatrist that the individual is mentally ill. 16 Del.C. §5003.

If the provisional admission certificate is done by a psychiatrist other than an employee of the hospital, the hospital has 3 days to "independently determine whether or not the involuntary person is a mentally ill person."[1] 16 Del.C. §5005(2).

---

[1] Section 5006 defines the rights of an individual whom the hospital has determined to be a mentally ill person. Such person is entitled to: (1) notice of

If the hospital then finds an individual to be mentally ill, it has "6 working days from the date of the provisional admission" to file a verified complaint seeking a judicial determination of the involuntary patient's mental status. 16 Del.C. §5007(a). Judicial proceedings must begin no later than 18 working days from the filing of the complaint. 16 Del.C. §5008(1). The proceedings begin with a probable cause hearing to determine whether an individual is legally being held at the hospital. Once probable cause is found by the court, a hearing to determine whether or not the patient is mentally ill must be

---

the factual grounds upon which the proposed hospitalization is based; (2) a hearing and a judicial determination of whether the confinement is based upon probable cause and whether or not the involuntary patient is a mentally ill person; (3) representation by counsel at all judicial proceedings; (4) discovery proceedings and the right to cross-examine witnesses and present evidence in his own behalf; and (5) a full record of the proceedings, including findings adequate for review.

held on "the earliest practicable date." 16 Del.C. §5008(4).

Contentions of the Parties

This statutory procedure was obviously not followed in Hicks' case. The provisional admission certificate was prepared 16 days after Hicks' admission rather than 3 days after admission as mandated by statute. 16 Del.C. §5005. The verified complaint was filed 26 days after Hicks admission rather than within 9 days as required by statute. 16 Del.C. §5007. Hicks' probable cause hearing was scheduled 40 days after his admission rather than within 27 days as prescribed by statute. The Plaintiff maintains that the procedure followed deprived him of his fourteenth amendment interest in remaining free from unwarranted confinement in a mental hospital without due process of law. On the other hand, the Defendant maintains that Hicks' constitutional rights were not violated and that he is entitled to summary

judgment on three grounds. First he contends that the statutory commitment procedure was not necessary because Judge Conner had the legal authority to impose as a condition of Plaintiff's probation his compliance with the directives of the Delaware State Hospital and that the condition could include continuing hospitalization. Next, he states that even if the probation order could not properly authorize an indefinite stay, the Plaintiff has no cause of action because neither count of his complaint alleges a deprivation of due process actionable under 42 U.S.C. §1983. Finally, he claims that even if a constitutional violation occurred, he is entitled to official immunity which bars the imposition of any monetary liability.

In deciding these motions for summary judgment, the Court is mindful of the clearly established summary judgment standard. Rule 56(c) of the Federal Rules of Civil Procedure provides that, upon

motion of a party, summary judgment shall be granted if the record before the court shows that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The burden of proving that the standard has been met is on the moving party. In the instant case, where both sides have moved for summary judgment, the record reveals no material factual disputes between the parties.

Requirements for a 1983 Action

In any section 1983 action, the initial inquiry must focus on two elements: (1) whether the conduct complained of was committed by a person acting under color of state law, and (2) whether the conduct deprived the person of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535-36 (1981). In this case, Feeney, as director of the state mental hospital, was clearly acting under

color of state law. Thus, the Court's inquiry must focus on whether his conduct deprived the Plaintiff of any rights protected by the constitution or laws of the United States.

The Plaintiff has alleged violations of procedural and substantive due process rights under the fourteenth amendment. The Court will first address his procedural claim.

Procedural Due Process

In order to prevail in an action alleging a violation of the fourteenth amendment right to procedural due process, the plaintiff must show:

(1) that the interest deprived was protected under the Fourteenth Amendment;
(2) that the deprivation was "without due process"; and
(3) that the charged defendant subjected plaintiff, or caused him to be subjected, to the deprivation.

Parratt v. Taylor, 451 U.S. 527, 536-537.

Both sides agree that the Plaintiff had a constitutionally protected liberty interest in remaining free from unwarranted

hospitalization in a state mental hospital.[2] Also, there is no dispute that Feeney, as director of the DSH, was the person officially charged with the care and custody of the Plaintiff. If there was a deprivation of a liberty interest, Feeney would be the person held accountable. Thus, the question facing the Court is whether the deprivation of Hicks' liberty interest took place without due process of law.

The Defendant first contends that the Plaintiff's stay at DSH was not without due process of law because it was pursuant to a probation order of the Family Court. He maintains that the proceeding in which Hicks was found in contempt of court gave

---

[2] Liberty interests may either originate in the Constitution or be created by state law. Meachum v. Fano, 427 U.S. 215 (1976). In O'Connor v. Donaldson, 422 U.S. 563 (1975), the Supreme Court clearly established that an individual has a constitutionally protected liberty interest in remaining free from unwarranted hospitalization in a state mental hospital.

him all the process he was due prior to confinement at DSH. This argument has only a facial appeal. Even though an individual may be referred to a mental hospital for evaluation and treatment as a condition of probation, United States v. Mercado, 469 F.2d 1148 (2d Cir. 1972), precedent suggests that an indefinite commitment in a mental hospital cannot be imposed as a condition of probation.[3] For example, in McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), the Court found that confinement in a mental hospital for observation and treatment cannot extend longer than an individual's sentence. Due process is denied when an individual is held on the basis of an ex parte order committing him for observation without the procedural safeguards commensurate with a long-term commitment.

---

[3] No cases have specifically dealt with this issue, a factor that is important in the later discussion of official immunity.

Even a prisoner is entitled to procedural protections including notice, an adversary hearing and counsel before he is involuntarily transferred from a prison to a mental hospital. Vitek v. Jones, 445 U.S. 480, 488 (1979). Because the involuntary commitment to a mental hospital engenders a loss of liberty with greater constitutional implications than that occasioned by a prison sentence, even "a convicted felon...is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital." Id. at 493.

Concern for protection of this liberty interest is heightened in a situation such as the one in which Mr. Hicks found himself. Judge Conner's only temporal limitation upon Hicks' stay was that he should remain in the hospital "as may be permitted by law." Unless that phrase is read to incorporate the limits of the

Delaware Commitment Statute or at a minimum the constitutional right to a hearing before involuntary commitment, Hicks could have remained in the hospital indefinitely.4

faced with the relevance of the cited precedents and understanding now the jeopardy of liberty interests involved, it is not enough for a Family Court Judge to throw the onus of constitutional interpretation on the shoulders of lay people charged with the responsibility of carrying out his order. The words "as may be permitted by law" could reasonably have been interpreted as window dressing legalese without specific constitutional connotation to a non-lawyer. Under the circumstances of this particular case, there is no shelter from constitutional redress for any court merely to say "as may

---

4 Hicks was given a 30 day jail sentence yet he spent 54 days at the Delaware State Hospital.

be permitted by law." In short, the requirements of procedural due process mandate reference to established commitment procedures if something more than a brief mental evaluation period is required when a judge imposes such a term of probation. To do otherwise denies a constitutionally protected liberty interest of the probated defendant without due process of law. The sentencing power of a judge, no matter how broad, does not abridge those rights.[5]

---

[5] Of course, the involuntary commitment procedures would not apply to situations where the mental status of the defendant is an issue in the case. A separate set of statutory guidelines applies to the situations where a judicial determination of the defendant's status has already been made. See, 11 Del.C. §403 (verdict of "not guilty by reason of insanity"); 11 Del.C. §404 (confinement of persons too mentally ill to stand trial); 11 Del.C. §405 (confinement of persons who become mentally disabled after conviction but before sentencing).

These categories are recognized in the Delaware State Hospital manual which states that a court may commit an individual to the Delaware State Hospital under a court order for the following specific purposes: a pretrial investigation to determine either fitness to stand trial or criminal

Clearly then, Hicks initial appearance before Judge Conner and his sentencing on a contempt charge did not provide Hicks with adequate process to justify his indefinite commitment to a mental hospital. The Defendant maintains, however, that even if Hicks' confinement was not acceptable as a condition of his probation, his due process rights were not violated because numerous avenues of post-deprivation process were available to correct any procedural defect in his admission to DSH. Procedural due process requires that an individual be given the opportunity to be heard at a meaningful time and in a meaningful manner when the state deprives him of life, liberty or property. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The Supreme

---

responsibility; a presentence investigation to aid in the determination of the sentence; for treatment of a person found unfit to stand trial because of mental illness when a person is found not guilty on grounds of mental illness. Delaware State Hospital Regulation 12.6. Hicks does not appear to fall into any of these categories.

Court has rejected the idea, however, that every deprivation must be preceded by such a hearing. The Court has recognized situations where post-deprivation hearings satisfy procedural due process requirements. Mathews v. Eldridge, 424 U.S. 319 (1976); Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Post-deprivation hearings satisfy due process demands, for instance, when the exigencies of a particular situation make it impossible to provide a full and meaningful hearing prior to the deprivation. Parratt, 451 U.S. at 540-541.

In Parratt v. Taylor, the Court found that the normal pre-deprivation notice and opportunity to be heard procedure may not be necessary where the state provides a post-deprivation remedy. This is particularly the case in situations where the deprivation occurred because of a random and unauthorized act and not because of any established state procedure. Id. at 538. Parratt concerned the rights of a prison

inmate who sued prison officials on the ground that they lost a hobby kit he had ordered. The kit was received by the prison but lost at some point before it could be given to Taylor. Taylor filed suit under section 1983, contending that he had negligently been deprived of property without due process of law. The Supreme Court agreed that the plaintiff had shown a deprivation of property under the fourteenth amendment yet denied Taylor's claim because he had not shown that the deprivation was without due process.

Parratt may be distinguished from this case in that it involved a property interest while this case involves a liberty interest. However, since the Parratt decision, a majority of courts have extended its analysis to situations involving a deprivation of a liberty

interest.[6] Rutledge v. Arizona Bd. of Regents, 660 F.2d 1335, 1352 (9th Cir. 1981); Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983); Thibodeaux v. Bordelon, 740 F.2d 329, 337 (5th Cir. 1984); Gilmere v. City of Atlanta, 737 F.2d

---

[6] The arguments for not extending Parratt to liberty interests deserve a brief mention here. Some courts have suggested that extending Parratt beyond its facts would effectively impose an exhaustion requirement in section 1983 cases, a result forbidden in Monroe v. Pape, 365 U.S. 167 (1961). See Brewer v Blackwell, 692 F.2d 387, 394 n.10 (5th Cir. 1982); Wakinekoa v. Olim, 664 F.2d 708, 715 (9th Cir. 1981). rev'd on other grounds, 461 U.S. 238 (1983). This exhaustion requirement objection misperceives Parratt's import by confusing the rights accorded by the fourteenth amendment's due process clause with the remedy afforded by section 1983. Parratt does not deny Taylor a remedy; it defined his rights. The decision does not require that state remedies be exhausted. It held that no constitutional violation occurred. Haygood v. Younger, 718 F.2d 1472 at 1480.

Another objection to an extension of Parratt to liberty interests is that post-deprivation damages cannot fully compensate for a loss of liberty. See, Ingraham v. Wright, 430 U.S. 651, 701 (1977) (Stevens, J., dissenting). This argument also fails. A loss is as incompensable under section 1983 as under state tort law. Hudson v. Palmer, 104 S.Ct. 3194, 3204 (1984).

894, 908 (11th Cir. 1984); Wolf-Lillie v. Sonquist, 669 F.2d 864, 871 (7th Cir. 1983); Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir.), cert. denied, 459 U.S. 1069 (1982); Juncker v. Tinney, 549 F.Supp. 574, 576 (D.Md. 1982); Barnier v. Szentmiklosi, 565 F.Supp. 869, 877 (E.D.Mich. 1983); Hickman v. Hudson, 557 F.Supp. 1341, 1347 (W.D.Va. 1983); Eberle v. Baumfalk, 524 F.Supp. 515, 517-518 (N.D.Ill. 1981). The Parratt decision itself implies that such an extension is appropriate by its citation to Ingraham v. Wright, 430 U.S. 651, a case involving a protected liberty interest. In Ingraham, the Court held that corporal punishment in schools administered without a prior hearing did not violate the students fourteenth amendment rights because "traditional common law remedies are fully adequate to afford due process." Id. at 672.

The more compelling evidence that Parratt applies to liberty interests,

however, lies in the logic of the decision itself. The Parratt court found a post-deprivation remedy to be satisfactory mainly because a pre-deprivation remedy would have been impossible. Since the loss occurred "as a result of a random and unauthorized act by a state employee" the state could not "predict precisely when the loss will occur." 451 U.S. at 541. In such case, it is "not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." Id.

This reasoning was expatiated in Hudson v. Palmer, 104 S.Ct. 3194 (1984). In Hudson, the Court extended Parratt, which concerned negligent deprivations of a prisoner's property by a state employee, to intentional deprivations of property.

> "While Parratt is necessarily limited by its facts to negligent deprivations of property, it is evident...that its reasoning applies as well to intentional deprivations of property. The underlying rationale of Parratt is that when deprivations of property are effected through

> random and unauthorized conduct of a state employee, pre-deprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct..."

Id. at 3203. Thus, it is the logic of Parratt that permits no principled distinction between deprivations of property and liberty interests. The relevant distinction is not between property and non-property deprivations but between isolated acts of misconduct which are not amenable to prior control and those deprivations resulting from established state procedure. Daniels v. Williams, 720 F.2d at 792. If a deprivation results from a "random and unauthorized act" by a state official, the state is no more able to provide a pre-deprivation hearing when the deprivation

involves a liberty interest rather than a property interest. Juncker v. Tinney, 549 F.Supp. at 576. Thus, post-deprivation remedies may suffice as procedural due process protection where the state itself had no control over the initial deprivation.

In the present case, Hicks' deprivation did not occur because of the "state system itself." The state system itself normally affords appropriate procedures to individuals such as Hicks, either through the Involuntary Commitment Statute, 16 Del.C., Ch. 50, or through the usual categories of approved court ordered commitments. DSH Reg. 12.6. However, because of the failure of the Defendant to follow such procedures, Hicks fell through the cracks of the system and was never given a statutory hearing as to his mental status. Hicks lost his liberty not through

the inadequacy of the state procedure but because that procedure was ignored.[7]

Once it is determined that the individual's deprivation of liberty resulted from a "random and unauthorized act by a state employee," the means of redress

---

[7] The Plaintiff contends that the exception to Parratt carved out in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), applies in this case. The Court strongly believes that it does not. Logan concerned an employee's charge filed with the Illinois Fair Employment Practices Commission alleging a wrongful discharge. The Illinois Fair Employment Statute gave the Commission 120 days within which to convene a fact-finding conference on the claim. However, through inadvertence, the Commission scheduled the fact-finding conference 5 days after the expiration of the period. On appeal, the Supreme Court reversed the Illinois Supreme Court holding that the failure to comply with the 120 day requirement deprived the Commission of jurisdiction to consider the charge. The Court found that the state system itself, i.e., the state procedural rule, violated the complainant's due process rights because the state system itself destroyed "a complainant's property interest by operation of law whenever the Commission fails to convene a timely conference..." 455 U.S. at 436. Logan is distinguishable from Parratt and the present case because it condemned a defect in the state system itself, not a defect in the way the system was administered.

provided by the state must be evaluated in light of the requirements of the due process clause. Cohen v. City of Philadelphia, 736 F.2d 81 (3d Cir. 1984). In the present case, Hicks had a wide variety of legal avenues available to him both to challenge his admission to DSH and to obtain damages for any wrongful acts by DSH. He could have moved for a new trial or appealed Judge Conner's decision to the Superior Court. Family Court Rules 280 and 300. Pending such an appeal, Hicks could have sought a stay of the Family Court order. Family Court Rule 330(e). He could have also sought post-dispositional relief after his time for appeal had expired. Family Court Rule 290. He could have sought the assistance of Family Court's probation department who could have altered the terms of his probation. Family Court Rule 270. In addition, habeas corpus relief was available to him under either 16 Del.C. §5013 or 10 Del.C., Ch. 69. These

procedures alone satisfied Hicks' due process rights. As the Third Circuit stated in Cohen v. City of Philadelphia, 736 F.2d at 86, "substantive mistakes...in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary." In addition to such procedural remedies, Hicks could have brought a suit for damages under state tort law.

Thus, the state provided adequate procedure to remedy any wrong the Plaintiff has suffered at the hands of a state employee. The state can do no more; it had no control over the Defendant's failure to follow the prescribed statutory procedures. And where the state can do nothing to provide an opportunity to be heard in advance, a chance to achieve redress after

the deprivation has occurred must satisfy due process.[8] Parratt at 541.

Substantive Due Process

The availability of state relief provided Hicks with ample opportunity to protect his liberty interest under the fourteenth amendment. Thus, his right to procedural due process was not violated by Feeney's actions. However, Hicks has asserted that Feeney's actions violated his substantive due process rights as well. It is clear that unlike procedural rights, if substantive constitutional rights are violated, the constitutionally recognized deprivation is complete at the time of the

---

[8] The Plaintiff maintains that pursuit of a post-deprivation state tort remedy would place an undue burden upon him since he would be forced to prove "gross or wanton negligence." This is not relevant to a determination of what process is due. Only a meaningful opportunity to be heard is required. Parratt at 540. The fact that the state remedies may not provide all the relief which would have been available under section 1983 does not mean that the state remedies do not provide due process. Id. at 544. Daniels v. Williams, 720 F.2d at 798.

action, irrespective of the procedures available before or after the deprivation. Parratt does not apply to substantive due process claims. Duncan v. Poythress, 657 F.2d 691, 704 (5th Cir. 1981); Wolf-Lillie, 699 F.2d at 871. However, Hicks' substantive due process claims are without merit and deserve only brief discussion.

Hicks asserts that he had a substantive liberty interest in the procedures of the Involuntary Commitment Act. The suggestion that state procedures can rise to the level of constitutionally protected interests was rejected by this district in Brandywine Affiliate NCCEA/DSEA v. Brandywine Bd. of Ed., 555 F.Supp. 852 (1983).[9]

---

[9] In Brandywine Affiliate, the District Court of Delaware rejected a discharged teacher's claim that the statute describing termination procedure created a constitutionally protected interest in that exact procedure. The court acknowledged the constitutional interest in continued employment but refused to hold that the state procedures used to protect that interest were constitutionally protected in and of themselves.

State procedural safeguards do not rise to the level of constitutionally protected interests.[10] "Although the existence of a liberty or property interest may be ascertained by reference to state law, once such an interest is identified, the task of defining the procedural protections which attach to that interest is wholly a matter of federal constitutional law..." Shango v. Jurich, 681 F.2d 1091, 1097-98 (7th Cir. 1982).

Thus, the fact that the exact procedures of the Involuntary Commitment Act were not followed in this case did not deprive Hicks of a substantive right

---

[10] The only exception to this rule is where "an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." United States v. Cacares, 440 U.S. 741 752-53 (1979). In this case, the Plaintiff was never expressly offered any assurances or reason to believe that his commitment would be in accordance with the procedures of the act. In fact, no evidence has even been offered to show that he even knew of the act's existence.

protected by the constitution. The state statute may have helped define Hicks' liberty interest but the procedures which attach to that interest are created by the minimum due process requirements od federal constitutional law, not by the state statute itself. 681 F.2d at 1098.

In Count II of his complaint, the Plaintiff asserts that the actions of the Defendant deprived him of his right as an involuntary mental patient to the least restrictive confinement consistent with professional judgment as guaranteed by the fourteenth amendment. In Youngberg v. Romeo, 457 U.S.307 (1982) the Supreme Court held that a patient's constitutional right to reasonably non-restrictive conditions of confinement is not abridged so long as the confinement decision is made in the context of a professional judgment as to its necessity. Id. at 321.

In the present case, professional judgment was exercised in the decision to

place Plaintiff in the Comegys Building. The record indicates that Hicks was examined by a DSH doctor before being assigned to the Comegys Building. Therefore, Hicks' substantive right to the least restrictive conditions of confinement was not violated.

Immunity

As the previous discussion indicates, the Court finds that Feeney did not deprive Hicks of any rights in violation of the due process clause of the fourteenth amendment. However, even if the Court had found that Hicks had stated a cognizable claim under the fourteenth amendment, Feeney would have been protected by qualified immunity in this case.[11] Qualified immunity is granted

---

[11] The Court does not accept Feeney's argument that he is entitled to absolute judicial immunity because his action were taken pursuant to a judicial order. Although such judicial immunity has occasionally been extended to protect activities of individuals carrying out a "judicial function," see Lockhart v. Hoenstine, 411 F.2d 455 (3d Cir. 1969); Williams v. Wood, 612 F.2d 982 (5th Cir.

to state officials to allow them to conduct their day to day duties without the constant fear of incurring monetary damages liability. The important function of such immunity has created a strong presumption against monetary liability for state officials.

These principles are recognized in Harlow v. Fitzgerald, a recent Supreme Court opinion clarifying the scope of

---

1980); Slotnick v. Staviskey, 560 F.2d 31 (1st Cir. 1977), cert. denied, 434 U.S.1077 (1978); Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973), the scope of absolute immunity has recently been limited. In Harlow v. Fitzgerald, 457 U.S. 880 (1982), the Supreme Court established a strict functional test for absolute immunity. In order to claim such immunity, an official must show that "the responsibilities of his office embrace a function so sensitive as to require a total shield from liability." Harlow at 813. As director of a state mental hospital, Feeney does not meet that burden. Feeney is simply an executive official of the state charged with carrying out the laws of the state with respect to the involuntary commitments made under the act. The application of absolute immunity to Feeney's position would serve no necessary policy function since his position as Hospital Director is not "a function so sensitive as to require a total shield from liability." Id.

qualified immunity. Under the standard set forth in Harlow, immunity is available only to officials whose conduct conforms to a standard of objective legal reasonableness. Id. at 819. This standard mandates that an official is protected by qualified immunity except when his conduct violates "clearly established constitutional or statutory rights of which a reasonable person would have known." 457 U.S. at 818.

Even if the Court had found that Feeney's actions violated Hicks' fourteenth amendment due process rights, his failure to institute commitment proceedings in no sense violated clearly established constitutional rights. In a recent decision, the Third Circuit defined "clearly established rights" for the purposes of qualified immunity. The court did not hold that precedent with an exact factual match to the situation at hand was necessary for a legal proposition to be considered "clearly established." The court held, however,

that a proposition is not "clearly established" when there are no precedents on point and critical aspects of the case have not been subjected to judicial scrutiny. People of Three Mile Island, et al v. Nuclear Regulatory Commissioners, 747 F.2d 139, 148 (3d Cir. 1984).

The Plaintiff in this case argues that all of the constitutional rights which the Plaintiff seeks to vindicate were clearly established as of November, 1982. He cites O'Connor v. Donaldson, 422 U.S. 563 (right of patient not to be involuntarily confined unless he is "dangerous") and Vitek v. Jones, 445 U.S. 480 (due process requires hearing prior to involuntary commitment) as concrete examples. Certainly such rights were clearly established with regard to individuals who arrived at the hospital through different avenues than those upon which Hicks arrived. However, Hicks' presence at DSH came about because of the conditions of his probation. It is a well-

accepted legal principle that terms of probation may impinge upon constitutional freedoms as long as the terms are reasonably related to rehabilitation and public safety. United States v. Stine, 675 F.2d 69, 71 (3d Cir.), cert. denied, 458 U.S. 1110 (1982); United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978).

Title 10, section 942 of the Delaware Code gives the Family Court the power to place an individual on probation under "such terms and conditions as the court deems proper." In light of the Family Court's discretion and the fact that the courts have consistently allowed wide latitude in the imposition of conditions of probation, it cannot be said that the constitutional rights of Hicks as a probationer were clearly established. There was no reason for the Defendant to know that the practice he followed with Hicks, who came to the hospital with a

court order requiring him to comply with the recommendations of DSH as a condition of his probation, was violating any constitutional rights. Feeney simply treated the order as an acceptable condition of probation imposed by the Family Court and even contacted the Family Court twice for guidance on what to do with Hicks.

As was the situation in The People of Three Mile Island, "this case was a far cry from situations involving a clearly established and well litigated general proposition in which the case at hand merely presents a new factual wrinkle. Id. at 148. There was no reason for Feeney to believe that his actions were improper. He had never encountered any situation where confinement to the hospital was not allowed as a condition of probation. Indeed, after a thorough search, this Court has found absolutely no precedent discussing analogous situations. Hicks' claim focuses on a

complicated interplay between the constitutionally accepted discretion given judges in imposing conditions of probation and the constitutional limitations on involuntary commitment to a mental hospital. It is a nether world of imprecise dimensions, the constitutionally approved powers of a judge and the constitutional protection of individual rights. Under such circumstances, Feeney had no obligation to predict the future course of constitutional law, Pierson v. Ray, 386 U.S. 547, 577 (1967), and it would be unjust to deny him qualified immunity.

The Plaintiff goes on to claim that Feeney is not entitled to immunity because he violated clearly established "statutory rights." It is true that the Harlow court acknowledged that officials may lose their immunity by violating "clearly established statutory...rights." 457 U.S. at 818. However, the Harlow court was referring to federal statutory rights which formed the

basis for the cause of action under section 1983 in that case.[12] Mere violation of a state statute that does not create a cause of action under 1983 cannot be used to overcome qualified immunity. Davis v. Scherer, 104 S.Ct. 3012 (1984).[13] In this case, the Plaintiff claims that the failure to follow the procedures of the Involuntary Commitment Statute did implicate constitutional rights actionable under 1983.

---

[12] In Maine v. Thiboutot, 448 U.S. 1 (1980), the Supreme Court held that section 1983 creates a cause of action against state officials for violating federal statutes.

[13] Davis involved a claim filed by a highway patrolman asserting that Florida officials had violated the due process clause of the fourteenth amendment by discharging him without a formal pre-termination or a prompt post-termination hearing. Both the District Court and the Court of Appeals held that the officials could be sued because they had not followed "clearly established" administrative regulations in effectuating the discharge. The Supreme Court reversed and limited denial of qualified immunity to violations of law that formed the basis for the 1983 action. In Davis, the plaintiff had made no claim that violation of the state administrative regulation implicated any constitutional rights actionable under 1983.

However, as the Court has already noted, the State Involuntary Commitment statute creates no such substantive rights actionable under section 1983. Therefore, in light of Davis v. Scherer, the fact that Feeney did not follow the procedures of the Involuntary Commitment Statute does not defeat his qualified immunity.[14]

For the foregoing reasons, the Defendant's motion for summary judgment is granted.

---

14 The Plaintiff relies heavily on Scott v. Plante, 691 F.2d 634 (3d Cir. 1982) to illustrate that a violation of statutory procedure can serve to abrogate qualified immunity. In Scott, the Third Circuit stated that even if the precise dimensions of an individual's constitutional basis for recovery were unsettled at the time of the action, violation of statutory rights were enough to lose qualified immunity. 691 F.2d at 639. This ruling is obviously changed in light of the Supreme Court's subsequent opinion in Davis holding that violation of statutory rights cannot overcome qualified immunity unless the statute forms the basis of the cause of action under 1983.

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-3527

ROY HICKS,
Appellant,

v.

ROBERT C. FEENEY, individually and in his official capacity as Hospital Director of the Delaware State Hospital, a facility in the Division of Mental Health, Department of Health and Social Services of the State of Delaware

(D.C. Civil No. 83-185)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

PRESENT: SEITZ, HUTCHINSON, and ROSENN, Circuit Judges

JUDGMENT ON REHEARING

This cause came to be heard on the record from the United States District Court for the District of Delaware and was submitted under Third Circuit Rule 12(6)

January 5, 1988 and resubmitted before the original panel May 26, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 14, 1987 be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

June 22, 1988

Certified as a true copy and issued in lieu of a formal mandate on July 22, 1988.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-3527

ROY HICKS,
Appellant,

v.

ROBERT C. FEENEY,
Appellee.

(D.C. Civil Action No. 83-185)

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ROSENN, Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit

judges of the circuit in regular active sevice, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Wm. D. Hutchinson
Circuit Judge

DATED: JULY 19, 1988

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-3527

ROY HICKS,

Appellant,

v.

ROBERT C. FEENEY, individually and in his official capacity as Hospital Director of the Delaware State Hospital, a facility in the Division of Mental Health, Department of Health and Social Services of the State of Delaware,

Appellee

On Appeal From the United States District Court for the District of Delaware
(D.C. Civil Action No. 83-185)

PRESENT: SEITZ, HUTCHINSON, and ROSENN, Circuit Judges

ORDER

ORDERED that panel rehearing in the above captioned matter is granted, and it is

FURTHER ORDERED that the clerk of this

court vacate the panel's opinion and the judgment entered thereon.

The following is the supplemental briefing schedule:

* * * *

by the Court,

/s/ C. Seitz
Circuit Judge

DATED: March 30, 1988

TEXT OF RULE 37(b)(2) AND 37(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE

(b) **Failure to Comply With Order**

* * * *

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

* * * *

(d) Failure of Party to Attend at Own

Deposition or to Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with proper notice,, or (2) to serve answers or objections to interrogatories submitted under Rule 33,, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule....

CERTIFICATE OF SERVICE

AND NOW, this 14th day of October, 1988, the undersigned hereby certifies that all parties required to be served have been served copies of the foregoing Petition for Writ of Certiorari, and that service was made, by personal service, by delivery of three copies thereof to the office of counsel for the Respondent at the following address:

Marcia Rees, Esquire
Department of Justice
Carvel State Building
820 N. French Street
Wilmington, DE 19801

Joseph M Bernstein

JOSEPH M. BERNSTEIN
Attorney for Petitioner

Supreme Court, U.S.
FILED
DEC 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-624 (2)

In The
Supreme Court of the United States
October Term, 1988

ROY HICKS,

Petitioner,

v.

ROBERT C. FEENEY, individually and in his official capacity as Director of the Delaware State Hospital,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General
Counsel of Record

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

MARCIA REES
Deputy Attorney General

Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 571-3047

Date: December 7, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

20 pp

QUESTION PRESENTED

Did the court of appeals and the district court abuse their discretion when they refused to allow petitioner to continue his civil rights action for nominal damages after he willfully failed to appear for his deposition on three separate occasions?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION

1. IT WOULD BE INAPPROPRIATE FOR THIS COURT TO REVIEW THE COURT OF APPEALS' CONSIDERED CONCLUSION CONCERNING THE "LAW OF THE CASE." 9

2. EVEN IF THE COURT OF APPEALS MISREAD ITS PRIOR OPINION, DISMISSAL WAS THE APPROPRIATE SANCTION IN THIS CASE 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Christianson v. Colt Industries Operating Corp., 108 S.Ct. 2166 (1988) 10

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3

Hewitt v. Helm, 107 S.Ct. 2672 (1987) 14

Mitchell v. Forsyth, 472 U.S. 511 (1985) 4

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) 11

Parratt v. Taylor, 451 U.S. 527 (1981) 3

Rhodes v. Stewart, 109 S.Ct. 202 (1988) 14

Taylor v. Illinois, 108 S.Ct. 646 (1988) 11, 12, 13

STATUTES AND RULES

42 U.S.C. § 1983 2

42 U.S.C. § 1988 14

Del. Code Ann. tit. 16, secs. 5001-14 (1983) 2

Fed. R. Civ. P. 26(c) 5, 12

Fed. R. Civ. P. 37(a) 4, 5, 13

Fed. R. Civ. P. 37(b) 5

Fed. R. Civ. P. 37(d) 5, 6, 12, 14

MISCELLANEOUS

C. Wright & A. Miller, *Federal Practice and Procedure* (1970) 12, 13

Fed. R. Civ. P. 37, advisory committee's note (1970 amendment) 13

No. 88-624

In The
Supreme Court of the United States
October Term, 1988

ROY HICKS,

Petitioner,

v.

ROBERT C. FEENEY, individually and in his official capacity as Director of the Delaware State Hospital,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

On November 18, 1982, a judge in the Family Court of the State of Delaware found petitioner, Roy Hicks, guilty of criminal contempt. The court sentenced Hicks to 30 days in jail, but suspended the imprisonment in favor of one year's probation. As part of its probationary order, the court sent Hicks to the Delaware State Hospital ("DSH") for a mental evaluation and ordered him to follow DSH's recommendations, including "continuing hospitalization,"

"as may be permitted by law." *Hicks II*, Pet. App. at A-48 to A-49.[1]

On November 23, DSH reported to the Family Court judge that Hicks suffered from a "psychiatric condition" requiring further evaluation. In a letter sent the next day, the hospital told the judge that Hicks exhibited symptoms of a "major mental illness" and recommended his commitment. Following the routine in cases of a patient's referral by a court, the hospital waited for further directions from the Family Court. When the judge finally responded, agreeing to the commitment, respondent Feeney, then the Director of DSH,[2] prepared a complaint seeking to have Hicks committed under Delaware's Involuntary Commitment Act, Del. Code Ann. tit. 16, §§ 5001-14 (1983).[3] *Hicks II*, Pet. App. at A-49, A-52; Feeney Deposition at 29-31 (April 10, 1984). The complaint was filed in the Delaware Superior Court on December 27, 1982. The initial "probable cause" hearing was scheduled for January 14, 1983, but Hicks was released from the hospital on January 12, 1983.

Four months later, Hicks initiated in the federal district court a civil rights action under 42 U.S.C. § 1983. In his complaint, he alleged that Feeney had confined him in DSH without due process. Hicks requested declaratory

---

[1]In this brief in opposition, the respondent will designate the various opinions in this case using the same terminology employed by the petitioner.

[2]Robert Feeney left DSH and employment with the State of Delaware in April, 1985.

[3]The procedures under the state law are summarized in *Hicks I*, Pet. App. at A-62 to A-64. The Delaware Superior Court supervises the commitment process.

and injunctive relief against Feeney in his official capacity and compensatory damages from him in his individual capacity.

On cross motions for summary judgment, the district court entered judgment in favor of Feeney. While agreeing that Hicks' hospitalization implicated a protected liberty interest, the district court found that Delaware, by its commitment act, provided constitutionally sufficient safeguards. Thus, in Hicks' case, any omission of the procedural protections resulted, not from an inadequacy in the state system, but an unauthorized failure to follow the state procedures. Looking to *Parratt v. Taylor*, 451 U.S. 527 (1981), it found, that in light of a variety of post-deprivation remedies, Hicks was afforded sufficient due process to redress the unauthorized failure of DSH to implement, upon Hicks' arrival, the state commitment act procedures. *Hicks I*, Pet. App. A-74 to A-84. Secondly, the court concluded that even if the federal constitution required a pre-deprivation hearing in this judicial commitment case, Feeney was entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Hicks I*, Pet. App. at A-94 to A-95.

On appeal, the Court of Appeals for the Third Circuit vacated the district court's judgment. Initially, it concluded that because DSH had apparently followed its normal procedure in delaying the use of the state commitment act until it received further instructions from the referring court, the district court had erred in finding the hospital's actions unauthorized so as to justify application of *Parratt*. *Hicks II*, Pet. App. at A-52 to A-53. In addition, the court of appeals ruled that the district court, in

its qualified immunity analysis, had not only misread Hicks' claim, but had extended the scope of official immunity by requiring too strict a congruence between established precedent and the facts of the litigated case. It remanded the immunity question for reconsideration in light of this Court's then-recent decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). *Id.*, Pet. App. at A-53 to A-57. Finally, the court suggested that the district court should also explore, as part of the immunity issue, whether Hicks' claim implicated a separate state-law grounded liberty interest created by the state commitment act and whether state procedures had been violated. *Id.*, Pet. App. at A-56 n. 4.

On remand, Hicks moved for summary judgment on the qualified immunity and state-law liberty interest issues. At the same time, the district court ordered discovery to be completed by February, 1986. Hicks made no application to limit the scope of discovery. Feeney noticed Hicks' deposition for January 28, 1986. Hicks appeared and answered questions for about forty minutes. At that point, he became agitated about answering questions on notes he had prepared on his stay at DSH. The deposition was recessed for an hour to allow Hicks to review the materials. Hicks, without any warning to his attorney, never returned. Feeney re-noticed Hicks' deposition for February 14, 1986. When his lawyer went to pick him up at his home, Hicks was gone.

Feeney then moved, pursuant to Fed. R. Civ. P. 37 (a), for an order requiring Hicks to attend his deposition. While this motion was pending, Feeney, in an effort to move the matter along, re-noticed Hicks' deposition for

April 8, 1986. Although he told his lawyer he would attend, Hicks, again, did not appear. On July 9, 1986, counsel for Hicks sent a letter to the district court explaining that his client chose not to appear at the depositions "because he did not want to discuss what he believed to be extremely private matters concerning what happened to him while he was confined." Although he was aware of the possible consequences, Hicks said he would not appear at any future depositions "because he valued his privacy concerning these matters more than any compensatory damages that the court might award." However, Hicks did not request any protective order under Fed. R. Civ. P. 26(c) nor assert any defense to the request for an order under Rule 37(a). *Hicks III*, Pet. App. at A-23 to A-24.

On July 16, 1986, the district court ordered Hicks to appear and co-operate in the taking of his deposition or risk the court's imposition of sanctions, including "an outright dismissal." Although he spoke with his lawyer two times about the order and he indicated he would comply, Hicks failed to appear for his court-ordered deposition on July 29, 1986. Feeney then moved to dismiss the action under Fed. R. Civ. P. 37(b)(2)(C) and 37(d). *Hicks III*, Pet. App. at A-24.

Hicks opposed the request arguing that dismissal would exceed the scope of the court's powers under Rule 37. Asserting for the first time in the discovery proceedings that the prior court of appeals decision had established that Hicks had been confined without due process, he argued that the only issues properly before the court on remand were Feeney's qualified immunity and dam-

ages. Because the former issue was a legal question, decided from an objective viewpoint, and because Hicks was presently willing, if necessary, to permit an order precluding any claim for damages beyond nominal and punitive damages (and attendant attorney's fees), Hicks contended that any testimony from him was now irrelevant to the remaining, now re-formulated, issues. Hence, total dismissal was an inappropriate sanction.

While recognizing that dismissal "must be a sanction of last, not first, resort," the district court dismissed the action under Rule 37(d). It found that Hicks bore personal responsibility for "willful" discovery violations because he made the "conscious decision," after being warned of the consequences, not to appear at the depositions and there was "no allegation that Plaintiff's mental state makes it difficult or impossible for him to appear at the deposition." *Hicks III*, Pet. App. at A-30, A-33 to A-34. Moreover, the violations were prejudicial because without the opportunity to depose Hicks, Feeney would be unable to ascertain or test the facts underlying his claims or to judge Hicks' credibility. *Id.*, Pet. App. at A-31 to A-32. Turning to Hicks' arguments concerning the scope of the remaining issues, the district court responded that "it d[id] not believe that the Third Circuit ha[d] ruled as a matter of law that Plaintiff was deprived of liberty without due process." *Id.*, Pet. App. at A-36. Moreover, even if liability had been established by the earlier decision, the district court still had "grave doubts" about allowing the case to proceed, despite the discovery violations, solely as an action for nominal damages and attorney's fees when Hicks "ha[d] lost whatever motivation he may have had to diligently pursue this lawsuit." *Id.*, Pet. App. at A-42.

Finally, the district court concluded that dismissal was appropriate because Hicks had flagrantly disregarded his obligations under the discovery procedures. Under the rules, if Hicks objected to the taking of his deposition or to a particular line of questioning, it was incumbent upon him to seek a protective order. Because he did not do so, but only raised his arguments concerning the limited issues in response to the request for sanctions, the court concluded that it could not tolerate such an abuse of the process. *Id.*, Pet. App. at A-45.

In 1988, a divided panel of the court of appeals affirmed the dismissal. Initially, the majority rejected Hicks' argument that its earlier opinion established Feeney's liability, concluding that in "[r]eviewing *Hicks II*, we do not find such a holding." *Hicks IV*, Pet. App. at A-6. Without resolution of the qualified immunity question, there could not have been a determination of liability entitling Hicks to a judgment. *Hicks IV*, Pet. App. at A-6 n.4. Moreover, because the earlier opinion made "no findings as to whether a hearing took place and if not, why not," Hicks' deposition testimony remained relevant to possibly shed light on "why he did not have a hearing and why he was placed in a maximum security building." *Id.*, Pet. App. at A-6.

In addition, the court concluded that in the absence of any prior holding of liability, the district court did not abuse its discretion in dismissing the claim. Cognizant that discovery sanctions are necessary not only to punish a party who fails to comply with the process, but to deter future violations, *Hicks IV*, Pet. App. at A-8, the court found that given Hicks' personal responsibility for not

attending the depositions, dismissal was an appropriate sanction. To allow Hicks to simply proceed with the case for nominal damages would ignore Hicks' prior willful conduct and would relegate the sanction process to "weigh-[ing] the relative prejudices to the parties," devoid of any deterrent content. *Id.*, Pet. App. at A-9. Finally, the court noted that even if the result was to deprive Hicks of the possibility of a judgment for nominal damages and attendant attorney's fees, the public interest in vindicating deprivations of civil rights would not preclude dismissal where "Hicks lost all interest in preserving his rights before he obtained any relief." *Id.*, Pet. App. at A-10.

In dissent, Judge Rosenn agreed with Hicks that the court's earlier opinion had indeed determined that Hicks' confinement had violated due process, leaving only the issues of immunity and damages. *Hicks IV*, Pet. App. at A-11 to A-14 (Rosenn, J., dissenting). In light of that conclusion, he found that although Hicks bore personal responsibility for willful and repeated violations, any prejudice to Feeney could be cured by limiting Hicks to an award of nominal damages. Because of the availability of this lesser sanction, dismissal had been an inappropriate remedy. *Id.*, Pet. App. at A-15 to A-19. Hicks' petition for rehearing *en banc* was denied by the court of appeals on July 19, 1988. Pet. App. at A-100.

———o———

REASONS FOR DENYING THE PETITION

This petition does not present any question which has divided the lower courts or which involves an important national issue. Instead, Hicks asks this Court to hold that, in this particular case, both the district court and the court of appeals abused their discretion when they barred him from continuing his civil rights action solely for nominal damages after he deliberately chose not to appear, three times, for scheduled depositions. In Hicks' two-tiered analysis, the court of appeals misread, initially, its own earlier opinion in *Hicks II*. In his view, the earlier case had established, as the "law of the case," that a due process violation had occurred. Because of this error, the subsequent dismissal of his entire action based on his discovery misconduct was disproportionate punishment in violation of the Due Process Clause. Any prejudice to Feeney could be sufficiently cured by limiting his recovery to nominal damages. He now asks this Court to invoke its supervisory power to vacate the dismissal. No such relief is warranted.

1. IT WOULD BE INAPPROPRIATE FOR THIS COURT TO REVIEW THE COURT OF APPEALS' CONSIDERED CONCLUSION CONCERNING THE "LAW OF THE CASE."

The linchpin of Hicks' argument is that this court must reverse the court of appeals' determination that its earlier opinion in *Hicks II* did not hold that Hicks had been confined without due process. However, common sense suggests that if any court would understand what "law" was established in *Hicks II*, it would be the court which authored the opinion. The parties extensively

argued the "law of the case" issue before the court of appeals and the court carefully considered it.[4] It would be an inappropriate exercise of this Court's "supervisory" power to grant this petition to overrule the court of appeals' considered conclusion concerning the scope of its earlier ruling in one particular case.

Secondly, to grant the petition in this case would require this Court to do more than simply determine whether the majority or the dissent in the court of appeals accurately read the prior opinion. Even if this Court would think that the dissent had the better reading of *Hicks II*, this Court could exercise its supervisory power only after independently concluding that a due process violation occurred. When this Court grants certiorari to a petition involving the "law of the case," the entire case is exposed to review. *Christianson v. Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2178 (1988). In this case, the record is simply not well enough developed for this Court to comfortably endorse the view that the hospitalization of Hicks was not preceded by adequate procedural safeguards.

2. EVEN IF THE COURT OF APPEALS MISREAD ITS PRIOR OPINION, DISMISSAL WAS THE APPROPRIATE SANCTION IN THIS CASE.

Indeed, regardless of whether the court of appeals misread its earlier opinion in *Hicks II*, the district court did not abuse its discretionary authority when it dis-

---

[4]The court of appeals panel in *Hicks IV* originally issued an opinion in March, 1988. Upon Hicks' petition for re-argument, it withdrew that opinion and requested additional briefing before rendering its final opinion in *Hicks IV*. *See* Pet. App. at A-102; *Hicks IV*, Pet. App. at A-6 n. 4.

missed Hicks' action for his repeated, willful violations of the discovery rules. Because rules providing for pre-trial discovery are an important part of the process for promptly and accurately resolving disputes, this Court has recognized that the imposition of sanctions under Fed. R. Civ. P. 37, including dismissal, is justified not only to "punish" the party for failing to provide pre-trial information but to deter him, and other litigants generally, from disobeying the discovery rules. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). Moreover, as this Court has recently emphasized in the similar context of pre-trial discovery in criminal trials, none of the constitutional guarantees, including the Due Process Clause, require the courts to link their discovery sanctions exclusively to the prejudice suffered by the adverse party. *Taylor v. Illinois*, 108 S.Ct. 646, 656 (1988); *id.*, 108 S.Ct. at 664 (Brennan, J., dissenting) ("Of course, discovery sanctions must include more than corrective measures. They must also include punitive measures that can deter future discovery violations from taking place."). In imposing sanctions, "[m]ore is at stake than possible prejudice to the [opposing party]." *Taylor*, 108 S.Ct. at 656. The choice of sanctions must also be concerned "with the impact of this kind of conduct on the integrity of the judicial process itself." *Id.* While constitutional guarantees may grant a party a right to plead and attempt to prove his claims, that right does not "automatically and invariably outweigh countervailing public interests" including "the interest in the fair and efficient administration of justice." *Id.*, 108 S.Ct. at 655. Particularly where the party is personally responsible for the discovery violations, his willful misconduct during the pre-trial process

justifies the "severest sanction", regardless of whether the prejudice to the other party can be alleviated by lesser sanctions. *Taylor,* 108 S.Ct. at 656; *id.,* 108 S.Ct. at 664, 666 (Brennan, J., dissenting).

Here, Hicks' conduct during the discovery process, regardless of his ability to mitigate the resulting prejudice by foregoing actual damages, was sufficient to justify dismissal. Three times Hicks, after giving indications that he would attend his deposition, failed to appear. He flaunted the authority of the district court by failing to appear after the court ordered him to do so under Fed. R. Civ. P. 37(a). The resulting harm was more than Feeney's inability to discover Hicks' testimony. His repeated conduct of indicating that he would attend, and then not appearing, prolonged this single aspect of the discovery process from January to July, 1986. The district court was forced to take time from its schedule to order him to appear and then conduct a hearing to determine the appropriate sanction for his disobedience. Counsel on both sides also suffered. For six months they wasted their time in a series of unsuccessful attempts to hold the deposition. To accept Hicks' belated plea that dismissal is disproportionate, because he is now willing to forego actual damages, would make the discovery process a mockery and relegate the discovery rules to mere admonitions.

Indeed, to grant this petition and reinstate Hicks' action would require this Court to overturn part of Fed. R. Civ. P. 37(d). Under that rule, a party may not defend against sanctions under Rule 37(d) on the ground that the discovery sought was objectionable unless the party previously applied for a protective order under Fed. R. Civ. P. 26(c). 8 C. Wright & A. Miller, *Federal Practice*

and Procedure § 2291, at 810-11 (1970).[5] Thus, if a party believes that he need not attend his deposition, "he must apply for a protective order." Fed. R. Civ. P. 37, advisory committee's note, subdivision (d) (1970 amendment). By requiring the party to so seek such an order, the rule insures that he will have "a fair and effective procedure whereby he can challenge the request made" while avoiding "the severe inconvenience or hardship on the discovering party" and the "substantial[] delay [in] the discovery process" which would occur if he simply failed to appear and withheld his objection until the sanction stage. *Id. Cf. Taylor,* 108 S.Ct. at 656 n.20 (in cases where party has legitimate objection to discovery, "[s]uch objections, however, should be raised in advance of trial in response to the discovery request and, if the parties unable to agree on a resolution, presented to the court" which can then enter a protective order).

Here, Hicks transgressed this rule. If Hicks had an objection to his deposition because it was beyond the scope of the remand order, it was incumbent on him to seek a protective order to resolve the issue rather than simply ignore the deposition notices. Similarly, if as expressed in his July 9 letter, his privacy was more important to him than his claim for compensatory damages, he should have then sought a protective order limiting discovery on the basis of his rejection of all damages beyond a nominal

---

[5]Similarly, if a party has objections to an order compelling discovery entered by the court under subdivision (a) of Rule 37, the time to voice the defenses is at the hearing on the order. He cannot sit idle while the order is entered and then make known his objections when sanctions are sought under subdivision (b). 8 Wright & Miller, § 2289, at 790-91.

amount. In this case, he did neither, but chose to raise his objections in response to the imposition of sanctions. Unless Rule 37(d) is to be a nullity, Hicks' petition should be denied.

Finally, Hicks' potential ability to recover his attorney fees, if his action continued and he prevailed, does not make the dismissal disproportionate. As this Court has recently recognized, the right to recover attorney's fees under 42 U.S.C. § 1988 does not mandate the continuation of a lawsuit where the party-litigant no longer has a personal stake or interest in the redress of his constitutional injury. *Rhodes v. Stewart,* 109 S.Ct. 202, 203 (1988). Because the award of fees is predicated, not on a party obtaining favorable rulings on points of law, but the entry of judgment, *Hewitt v. Helm,* 107 S.Ct. 2672, 2676 (1987), section 1988 does not impose its own rules for when actions may cease to be viable or may be subject to dismissal. Thus, if, as here, Hicks is not entitled to pursue his claims because of his willful discovery violations, section 1988 does not mandate that the district court overlook his defaults. *Stewart,* 108 S.Ct. at 203.

———o———

CONCLUSION

For the above reasons, Hicks' petition should be denied.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General
Counsel of Record

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

MARCIA REES
Deputy Attorney General

Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 571-3047

Date: December 7, 1988